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Supreme Court of the United States

OCTOBER TERM, 1936

No. 652

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, *et al.*,

Appellants,

versus

ALICE LEE GROSJEAN, Supervisor of Public Accounts, State of Louisiana, *et al.*,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

ORIGINAL BRIEF ON BEHALF OF APPELLEES.

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ORIGINAL BRIEF ON BEHALF OF APPELLEES.

OPINION BELOW.

The opinion rendered by a statutory court of three judges is reported in 16 F. Supp. 499. (Copy of opinion contained in addenda to this brief, *p. ix*).

STATEMENT OF THE CASE.

Appellants, The Great Atlantic & Pacific Tea Company, Sears, Roebuck & Company, Wohl Shoe Company, Consolidated Millinery Company, W. T. Grant Company, Scott-Burr Stores, J. C. Penney Company, F. W. Woolworth Company, J. J. Newberry Company, H. L. Green Company, Liggett Drug Company, Incorporated, Montgomery Ward & Company, G. R. Kinney Company, Incorporated, Fire-

stone Tire & Rubber Company, Goodyear Tire & Rubber Company, Melville Shoe Corporation and General Electric Company, all foreign corporations operating retail units or stores in Louisiana, attack, in this suit, the validity of Act 51 of the Louisiana Legislature of 1934, a copy of which Act appears in the addenda to this brief, *p. i.*

The Statute attacked was enacted by the Louisiana Legislature pursuant to the provisions of Section 10, Article 8 of the Constitution of Louisiana for the year 1921, authorizing the Legislature of Louisiana to levy excise, license or privilege taxes. (Pertinent part Section 10, Article 8, Constitution of Louisiana, p. 48, this brief).

The Act involved levies a license tax for the year 1935, and for each subsequent year, upon each person, firm, partnership, corporation or association of persons engaged in the business of operating or maintaining, a store or stores in Louisiana, where such store or stores are part of a chain or system under the same general management, supervision, ownership or control, and where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail. *Section 1 of Act 51 of 1934.*

Act 51 of 1934 classifies the business of operating chain stores in Louisiana according to the type of business done, and according to the value of the privilege of operating stores in Louisiana in multiple form.

The principal attack made on the constitutionality of said statute by appellants is that the statute violates the equal protection and the due process clauses of the Consti-

tution of the United States, and similar provisions in the Constitution of Louisiana, for the reason that, as alleged by appellants, the statute, in effect, taxes property outside the borders of the State of Louisiana and unjustly discriminates against them.

Summary of Appellees' Testimony.

Respondents offered the testimony of the following witnesses: A. D. Turner, W. C. Sugg, A. A. Allen, E. M. Steen, Joe Isaacman, Clark Faulk, J. W. Baker, J. S. Trisconi, J. W. Elston, W. C. Marshall, J. H. Brown, C. B. Ellis, B. Morgan, W. E. Penick, Lorris M. Wimberly, James T. Burns, and James D. Huck, Jr. (R. pp. 190-252).

For the convenience of the Court, the most important parts of the testimony of appellees' witnesses follow:

A. D. Turner (R. p. 196).

I am a resident of the City of Minden, Webster Parish, Louisiana; for twenty years served as President of the Bank of Webster, Minden, Louisiana, and President of Minden Building & Loan Association; served as Mayor of Minden and as President of Webster Parish School Board.

For more than 25 years, I have conducted, in said city, a retail business, selling general merchandise, groceries and meats; during 1925 to 1926, my business was one of the largest, outside of Monroe and Shreveport, in North Louisiana.

I have promoted and encouraged civic development; have paid my share of taxes to pay for schools, streets, court

house, and other public improvements. Chain operators, since 1926, have evidently believed Minden a fertile field to exploit, as there has been a steady influx of retail chain units, handling practically all lines of merchandise.

I know that the purchasing power behind each retail unit operated by chains, created by the combined purchasing power of all units, enables chains to purchase merchandise cheaper and undersell independent merchants who do not possess that tremendous purchasing power. The natural result is that competitors of chains who do not enjoy this large purchasing power and other advantages are unable to meet prices of chain retail units for the reason they operate one unit or a smaller number of units than the larger chains, and they are unable to compete with that purchasing power created by the fact that their competitors, operating larger chains, purchase for all units in huge volume; I am unable to purchase from manufacturers due to my limited purchasing power. I am compelled to purchase practically all of my merchandise from wholesalers. Due to my inability to meet chain retail prices, my business has fallen off to where I am operating at a loss.

I have endeavored to purchase as cheaply as possible, in order to compete with retail chain units, but I have found it impossible to meet the competition of chain units for the reason I operate only one unit, and do not have the volume of business required to purchase in the quantities purchased by my chain competitors; that I do not enjoy the bargaining power, and I am not in a position to demand and receive discounts, concessions and other advantages from manufacturers, enjoyed by chains with pur-

chasing power created by the fact that purchases are made for the entire organization.

I know that retail chain units are monopolizing the retail trade in the City of Minden because they are able to and do undersell their competitors, and that if something is not done to check the devastating effect of chain units underselling the smaller operators, it is only a question of time until there will be no retail units in said city except chains.

I know from my experience, and my knowledge of buying, covering a period of 25 years, that the greater the amount of purchases, the greater the buying power, and the greater the advantages afforded the operator. Further, that the greater the number of units in the chain or system, the greater the buying power, and the greater the opportunity for purchasing at lower cost, the lower cost of distribution, the lower cost in advertising, and the greater the many other advantages accruing to such operators.

I know that all the retail units of a system or chain, wherever situated, contribute to the purchasing power created by the entire set of units. This power enures to the benefit of each unit, and gives each unit the multiple advantages growing out of the operation of a chain system of retail stores.

I have been in the retail business, selling groceries and meats, for a number of years and am thoroughly familiar with the trade. Throughout the United States grocery stores carry the same general line of merchandise.

With one exception, the chain retail units in the City of Minden do not own the buildings in which they operate, and the one that does own its property is a sectional chain operating only ten stores.

I know that chain stores, as a rule, do not co-operate with the permanent citizenship of the local community in furthering the activities which build up a community.

W. C. Sugg (R. p. 190).

I am a resident of the City of Minden, Webster Parish, Louisiana. Since 1917 I have been actively engaged in operating one store where merchandise is sold at retail.

My business has the same financial backing as the average independent merchant throughout Louisiana. Until recent years, I made reasonable returns on my investment and made sufficient money to enable me and my family to enjoy the necessities and comforts of life enjoyed by the average American family.

After Minden had developed into a prosperous city of some 6,500 people and had built churches, schools, paved streets, and made other public improvements, all built at the expense of the permanent residents of the community, various and sundry chain operators, some national, some sectional, found that the permanent residents of Minden had built a splendid city, and saw fit to establish therein retail units of their system.

Chain units in practically all lines of business have been established in Minden. These units are housed in

rented properties. Generally, the chains brought their own employees, paid small wages, and set out to undersell the long established businesses of Minden, and thereby destroy the local and independent merchants who had, through the years, built up said community.

Prior to the influx of the chain, there was abundant competition among independent merchants, but all competitors were on the same footing; that is, they were all compelled to buy from wholesalers for the reason that they did not purchase goods in sufficient quantities to warrant direct buying from the manufacturer. They all paid their proportionate share of the taxes, practically all owned their own buildings, and, in general, operated in the same manner. This competition, prior to the influx of the chain retail units, gave the consuming public the benefit of any low cost.

The situation, prior to the influx of the retail chain units in the city, developed men of character and independence, furthered independent thought and was conducive to better citizenship. Ownership of their homes and places of business created a hope and enthusiasm enjoyed only by those living under such conditions.

By underselling local independent merchants, chains are gradually eliminating the independent merchants. One by one they have taken bankruptcy or gone into the hands of a receiver. To meet chain store prices, independents are compelled to operate at a loss. Unless some action is taken to place the independent merchant on a fairer plane and better enable him to compete with the retail chain units, it is only a question of time until there will not be

an independent merchant left in Minden. This statement is true of practically every line of business.

I have endeavored to keep abreast with the modern trend of marketing and buying. I have attempted to purchase as near the source of manufacture as possible; have demanded that goods be sold to me as cheaply as anyone else, and have demanded discounts, advertising allowances, brokerage fees, and other allowances that are not shown on the face of invoices that are allowed chain operators, but same have been refused.

I have read Paragraph 88 of the answer filed by the State in this suit. I received no such allowances or discounts from anyone from whom I purchase goods, as is shown in said list, although I have demanded them.

I carry the average size stock of goods that is usually carried by an independent merchant; my purchases are not sufficiently large to warrant shipments in carload lots. Chain operators competing with me have a great number of units, one of them 47, and one 10, and others with more than 10, which enable them, because of the purchasing power created by all units, irrespective of location, whether within or without Louisiana, to buy and ship in carload lots to their centrally located warehouses, and distribute the merchandise to their individual retail units. My purchases are not sufficient in quantity to warrant such operation; my merchandise is shipped by packages, usually by local freight or express.

Based on my experience, I know that, as a general proposition, the greater the number of retail units op-

erated by a chain, the greater the purchasing power of the chain, and the greater the discounts, advertising allowances, and other concessions given to chain operators by wholesalers and manufacturers; that when an operator has several retail units, he can avoid buying from the wholesaler and purchase directly from the manufacturer, and purchase larger quantities and thereby save the wholesale commission, together with lower cost of transportation.

I know that all of the retail units in a chain or system contribute to the purchasing power. This is true irrespective of their location.

In other words, if a retail chain operates 100 stores in Louisiana, 100 stores in Texas, 100 stores in Minnesota, 100 stores in Arkansas, and 100 stores in Mississippi, each retail unit, irrespective of location, contributes to the central purchasing power of the chain, it being the practice of the chains to have a central purchasing agency for their units, and behind each unit is thrown the entire purchasing power created by the entire chain or system.

If, for example, a chain of 15,000 units has only one unit in Louisiana, the entire purchasing power, created by all the units, is behind the one unit located in Louisiana. In other words, retail units outside of Louisiana contribute materially and substantially to the effectiveness of the operation of the retail unit in Louisiana in purchasing power, advertising allowances, and other advantages.

The greater the number of retail units, the greater the advantages accruing to the operator of the retail chain, and no maximum is reached. For example, when the retail

units are increased to an enormous proportion, the operator may engage in manufacturing, operating his own brokerage establishment, thereby making brokerage fees, and be in a position to demand further concessions from the manufacturers.

That over 50% of the retail business in Minden is done by chain organizations that have come into Minden after the city was established, after schools were built, after streets were paved and paid for. Chains came into the City of Minden for the reason that it was a splendid and thriving city.

The chains have moved into Minden and are now occupying buildings formerly occupied by independent merchants, who have gone out of business because of their inability to compete with the chains; that the chains are merely renting the properties in Minden, not for the purpose of building the town, as shown by the method of handling their business, but are operating solely and only for the purpose of underselling local independent merchants, and thereby obtaining a monopoly on the retail trade of the City.

I am familiar with the conditions in other cities and towns in Northwest Louisiana, and know that the conditions in the entire section are the same as those existing in the City of Minden, with reference to the influx of retail chain units.

I come in contact daily with persons who have been independent, prosperous retail merchants in days gone by, men who have contributed their energy and funds in the up-

building of said cities, and who have been unable to compete with the operators of the retail chains in said cities; that some of these men are out of employment, and some of them have been employed by the chains at meager salaries.

If independent merchants continue to decrease, and the chains increase, as they have in the City of Minden, since 1925, it is only a question of time when chain units will be the only retail units operating in the City of Minden, which condition is not favored by thinking persons, and is not conducive to the welfare of the people of this locality.

A. A. Allen (R. p. 202).

I have been engaged in the retail grocery business for a number of years, and now own and operate two retail grocery units in the City of Baton Rouge.

For six years I was general manager of a grocery chain in Baton Rouge, consisting of 32 stores. I am thoroughly familiar with the operation of chain units. The policy of the chain organization for which I worked, and which now has a monopoly on the retail grocery cash and carry business in Baton Rouge, was to destroy competition, and in the territory covered by this chain, this aim has been accomplished.

It was the policy of the chain that employed me to open units next to independent retailers and to slash prices to such an extent that the independent retailer was forced to close his doors, the chain being in a position, because of its size and financial backing, to take advantage of and destroy the independent operators.

Attacks on independent merchants by the chain which employed me was systematically carried out until said chain has a monopoly on the retail grocery trade in the territory within which said chain operates. It was a part of my job, while employed by the chain, to engineer the operations of the chain for the purpose of destroying said competition, as set out in my testimony.

The policies described in my testimony, which include the attacks on independent merchants and smaller retailers, was made possible by the fact that the chain which employed me operated a number of units and enjoyed a larger purchasing power and other advantages accruing to the operators of multiple stores.

I know that each unit in a chain contributes to the central purchasing power of said organization as a whole, irrespective of the location of the units, and that the power of advantages created by the whole is behind each unit.

Illustrating the above statement, the coffee buyer of the Great Atlantic & Pacific Tea Company buys the coffee for all the units operated by said concern. Likewise, the central purchasing agent for the Great Atlantic & Pacific Tea Company buys all of the oleomargarine needed by the units of the Great Atlantic & Pacific Tea Company. In other words, every unit of the Great Atlantic & Pacific Tea Company contributes to the central purchasing power of the entire system, and that central purchasing power is behind each unit operated in Louisiana or elsewhere.

Further illustrating, while employed by a chain of 32 retail units in Baton Rouge, the Great Atlantic & Pacific Tea Company, with a lesser number of stores in Baton Rouge, purchased from a wholesaler in Baton Rouge oleomargarine at 2c a pound less than the wholesaler would sell it to my chain. The wholesaler explained the price which the Great Atlantic & Pacific Tea Company paid was set by the manufacturer in Chicago, and was furnished the stores of the Great Atlantic & Pacific Tea Company of Baton Rouge under a contract with the central purchasing agent of the Great Atlantic & Pacific Tea Company, which agent purchased all of the oleomargarine that would be used by all of the retail units of the Great Atlantic & Pacific Tea Company over the United States. This shows conclusively the enormous purchasing power created by the entire system of the Great Atlantic & Pacific Tea Company is behind each unit operated in the system. The benefits that accrue by virtue of the operation of multiple units enures to every unit operated. Chain operators, by virtue of their enormous purchasing, can, and do destroy years of work and building by jobbers and wholesalers. Illustration: When a wholesaler builds up a demand in a community for a certain product, if the wholesaler refuses to meet the demands of the chain organization in respect to discounts and allowances, it is the practice of chains to purchase the product elsewhere and retail it in competition with the same commodity sold by said wholesaler, and, if necessary, even sell it below cost until the wholesaler meets the demands of the chain or quits handling the commodity. If the wholesaler quits handling the commodity, the chain can then buy from the manufacturer, and name its own retail price.

Chain organizations will not come into a city or town unless it is a thriving community, one that has been built up by the permanent citizenship, one with schools, churches, roads and public improvements completed, and no better example of this exists than the City of Baton Rouge. Third Street, the principal street of the City, originally lined with stores operated by independent merchants, which merchants built the City of Baton Rouge, paid taxes and paved the streets, built schools and established a desirable place in which to live, is now lined with chain stores in practically every line of business, and there are only two independent firms of any consequence left on said street.

Illustrating: F. W. Woolworth has a store on Third Street in a building formerly occupied by an independent merchant. The entire purchasing power and all advantages accruing to the Woolworth chain is behind this unit. The same can be said of every chain unit on Third Street, and on the other streets in the City of Baton Rouge.

The onslaught made on the City of Baton Rouge by chain stores is a menace to the community, and chain ownership does not develop good citizenship. The conditions described in my testimony as existing in Baton Rouge are similar to those existing elsewhere in Louisiana.

A person who owns his own business is more interested in the upkeep of the town, its developments, and makes a better citizen than a person employed in a chain unit where he is simply a part of the machine, and receives a meager wage.

Each of my retail grocery units contribute to my purchasing power.

E. M. Steen (R. p. 200).

I am the owner of the Jitney Jungle stores in Monroe, Lake Charles, Rayville and West Monroe. I own and operate a total of eight stores. I can buy my goods cheaper than the independent grocers can purchase them for the reason that I buy in larger quantities. I know that the greater the number of units in the chain, as a general rule, the greater the purchasing power, and other advantages.

I know that it is impossible for me to compete with an organization with the purchasing power of the Great Atlantic & Pacific Tea Company, first, because the enormous purchasing power of this company gives them a decided advantage in rebates, and in the purchase of their goods; second, because their large operations permit them to operate upon a smaller margin of profit, and the Great Atlantic & Pacific Tea Company could operate at a loss in the towns in which I operate, and drive me out of business, and recoup the losses at other points where it has no competition.

I am in direct competition with the tremendous purchasing power enjoyed by the Great Atlantic & Pacific Tea Company, created by its entire chain. Because of the small size of my chain, I am unable to obtain any rebates sufficient to operate upon, and if I operated upon the small margin of profit as does the Great Atlantic & Pacific Tea Company, I would fail in business. The Great Atlantic & Pacific Tea Company increases its profits by the secret rebates paid to it by the manufacturers.

Joe Isaacman (R. p. 201).

I am Vice-President and General Manager of the Monroe Furniture Company, Ltd. We operate a chain of five stores situated in Louisiana and Mississippi. I know that the operation of multiple units has many advantages, such as enormous purchasing power, lower cost of administration, etc. The saving in the cost of the administration, and the saving in the purchase price as a result of the enormous purchasing power, enures to the benefit of each unit in the chain, and brings about a lower cost per unit for operation.

I know that most chains operate under a centralized banking system. They do not carry bank accounts in the communities where they operate, but merely use the local banks for depositing their money, immediately drawing exchange on New York for the forwarding thereof; that the account is one which the banks cannot use to loan, and is not profitable to the banks.

I know that in Monroe, none of the chains borrow from the local banks, but the same are all financed out of New York City. I know that none of the National chain stores in Monroe, of any size, own their own property.

I know that when I install a store in any locality which is a part of the chain with which I am connected, whether in this state or out of the state, I take into the locality the full amount of the purchasing power of the entire chain of which that chain is a member, and throw that purchasing power, and other multiple advantages, in direct competition with the other stores there. It is an

undisputed fact that the larger the purchasing power, the lower the original cost of the commodity, and the greater the advantages to the entire system. All of these advantages are enjoyed by each individual unit, wherever located.

Clark Faulk (R. p. 207).

I am a resident of Monroe, Ouachita Parish, Louisiana. For the past 30 years, I have operated a grocery business in Monroe, and at present I am practically the only independent grocer of any size left in said city.

Formerly, all grocery stores in Monroe were owned by local citizens. Then, the general method of doing business was to purchase their groceries from the local wholesalers. The chain stores now control over 90% of the grocery stores in Monroe.

Monroe is a city of approximately 30,000 inhabitants. Due to the growth of the chain stores in Monroe, practically all independents have been driven out of business. The chains purchase in such quantities that they can buy direct from the manufacturer, which an independent cannot do. It is a well known fact that chain stores purchase their merchandise for considerably less than I can, or any other independent can, and the only way I can keep my business at all is to extend credit which chains refuse to do. I attribute the fact that I extend credit as the only reason I am in business today.

I have been a resident of Ouachita Parish for 40 years; own my own property. If something is not done to equalize my business with the enormous purchasing

power brought into this locality by the chain stores, it will only be a question of time until the entire grocery business will be operated by chains.

J. W. Baker, J. S. Trisconi, J. W. Elston, W. C. Marshall, and J. H. Brown
(R. p. 209).

We are independent wholesale grocers, domiciled in Louisiana, and serving the independent retail merchants of northwest Louisiana. We know that retail chain store units have an advantage in the matter of taxation, as compared to independent retailers, by reason of the enormous purchasing power created by all the units in a chain. The chain can purchase directly from the manufacturer, which saves in taxes that are paid by wholesalers from whom independents are compelled to buy, and which taxes are included in the purchase price of the merchandise purchased by independents.

We are called upon frequently to make substantial contributions to local charity and local civic organizations. This outlay runs into thousands of dollars a year. These obligations to the community are generally avoided by chain stores.

Within the past ten years in our trade territory, three wholesale grocers, well established for over 25 years, have liquidated their business due to inability to operate profitably because of reduced volume of business, due to a considerable extent to diversion of volume from independent retail merchants to chain stores. If the large National chain stores are permitted to continue operating with un-

fair advantages, it will eliminate a large number of independent merchants, which would tend to create a monopoly, increase unemployment and be ruinous to the public.

It is a fact, well known to us, that the chain store method of merchandising tends to disregard the local independent wholesale grocers. The stores owned by these chain systems, whether they be one or many within our State, draw their supplies from scattered warehouses, mostly out of the State, owned and maintained by their system. If a chain organization, therefore, has within the State only one store, and in other states thousands of stores, that one store has the same advantages as the stores located outside the boundary of the State.

C. B. Ellis (R. p. 198).

I am a resident of East Carroll Parish, Louisiana. I am one of the owners of Ellis Stores, Incorporated, a Louisiana corporation, which operates five stores, three in Louisiana, one in Mississippi, and one in Arkansas.

My stores sell in competition with Kress and Woolworth, and smaller chains and independents selling the same class of merchandise.

I managed a store operated by S. H. Kress Company for six years, and I am familiar with the operation of the larger chain retailers.

From my knowledge obtained while employed by Kress, and while operating my present five stores, I know of my own knowledge that the greater the number of units in a chain, the greater the purchasing power of the whole system, which is usually done by a central purchasing agent.

I know from my own experience, above referred to, that all the units of a retail chain contribute to the central purchasing power of the chain or system, and this is true irrespective of state lines, and location of stores. Illustrating, my store in Mississippi and my store in Arkansas contribute to the purchasing power of my chain of five stores, just as much as if they were located in the State of Louisiana, and the fact that the two stores are across State lines, makes no difference in the multiple advantages accruing to me by virtue of the fact that I operate a chain of five stores.

Among the multiple advantages accruing to me by virtue of the fact I operate five stores, are that I enjoy an advantage in purchasing power, lower cost of distribution, lower cost of operation, and the like, over a person operating four stores, or three stores, or two stores, or the independent merchants, and likewise the operator of six or more stores has a distinct advantage over me. In other words, the greater the number of units in a chain, the greater the advantages accruing to the operator in purchasing power, cost of distribution, etc.

The larger chains enjoy a distinct advantage over my chain of five stores in that they can afford, and do afford, instructors who train the managers and other personnel in the stores in the art of properly displaying their merchandise and commodities. I know, of my own knowledge, that this is a distinct advantage. I know that the greater the size of the chain, the greater the ability to keep experienced buyers at the source of supply, thus obtaining better prices. For example, when I was employed

by Kress, that Company kept a buyer in France, purchasing Val Lace, and as a result, obtained merchandise at a lower price than the smaller chains could; the independent merchants could not in any manner enjoy this privilege. I know that the greater the size of the chain, the greater the opportunities to avoid buying from jobbers and wholesalers, and the greater the ability to buy direct from the manufacturer, thus obtaining much lower prices.

I know that persons owning their business are better citizens, and have a greater interest in upbuilding the cities in which they live.

B. Morgan (R. p. 208).

I reside at Jasper, Jasper County, Texas. I am general manager and purchasing agent for Morgan & Lindsay, and have been since the organization in 1921. We operate 28 stores in the State of Louisiana.

I know that the National Chain Stores have an advantage over the Morgan & Lindsay stores, because of their buying power. They receive rebates and advantages and allowances that the Morgan & Lindsay stores are not able to obtain.

I know that many factories refuse to sell to Morgan & Lindsay merchandise because all their production and output is taken up by the National Chains.

W. E. Penick (R. p. 211).

I reside in New Orleans. I am Vice-President of the H. G. Hill Stores, Incorporated, and as such, I am Executive Head of such corporation.

The Great Atlantic & Pacific Tea Company has filed a suit entitled, "The Great Atlantic & Pacific Tea Company, plaintiff, v. Alice Lee Grosjean, Supervisor of Public Accounts, et al." attacking the constitutionality of Act No. 51 of the Louisiana Legislature for the year 1934. In the bill of complaint, The Great Altantic & Pacific Tea Company averred as follows, to-wit:

> "• • • That said corporation (referring to H. G. Hill Stores, Inc.) is engaged in the State of Louisiana in precisely the same character of business as plaintiff under the same conditions • • • (Article #15 of Bill of Complaint)."

This statement is not correct and is misleading. I, therefore, feel compelled to point out to the Court some of the essential differences between the operation of chains of great magnitude, such as The Great Atlantic & Pacific Tea Company, and the operations of small chains, such as the H. G. Hill Stores, Incorporated, local wholesale jobbers and independent retailers.

The H. G. Hill Stores, Inc. is a local organization having neither a sectional nor national scope. Its purchasing power is limited to and by the needs of its ninety-two (92) stores. The purchasing power which it possesses may properly be compared to that which is possessed by a number of other local wholesale jobbing houses, many of whom purchase merchandise for and service a greater number of stores than belong to the Hill Store Organization. Contrast this with the operations of a chain such as the Great Atlantic & Pacific Tea Company which possesses a purchasing power so great as to enable it to fill the requirements of its fifteen thousand two hundred retail outlets. The advantages which accrue to a chain such as the

Great Atlantic & Pacific Tea Company as a consequence of its great purchasing power and from other factors which work in favor of an operation possessed of the bigness and wide scope of the Great Atlantic & Pacific Tea Company are obvious. They are such as to definitely and completely differentiate its operations from those of the small chain, the local wholesaler and the independent retailer. Some of the many material advantages possessed by a large chain of the type of the Great Atlantic & Pacific Tea Company which serve to differentiate its operations from those of the small chains such as the H. G. Hill Store, the local wholesale grocer and the independent retailer are the following:

(1) The Enormous Purchasing Power of the Great Atlantic & Pacific Tea Company places it in a superior position. (Sales approximate one billion dollars per annum and have exceeded this figure—sells one-tenth of all food sold at retail in the United States of America.

(a) RESULT—Manufacturers pay the sum of $6,105,000 per annum to the Great Atlantic & Pacific Tea Company by way of special, secret concessions and rebates over and above the usual trade discounts and rebates. Similar sums have been received by it in preceding years. These facts have been admitted by the duly accredited representatives of the Great Atlantic & Pacific Tea Company in their testimony before the Special Committee appointed by the House of Representatives to investigate the American Retail Federation. The testimony in part of their representatives appears on page #461 of the report of this Committee and is as follows, to-wit:

INTERROGATOR (MR. LUCAS): "IN OTHER WORDS, THROUGH THESE

CONTRACTS THE A. & P. CO. RECEIVED, IN REBATES, A TOTAL AMOUNT OF $6,105,000 FOR THE YEAR 1934?"

Mr. Gundrey, a duly accredited representative of the Great Atlantic & Pacific Tea Company testified:

"Yes."

"MR. CHAIRMAN, ONE MORE QUESTION. THAT DOES NOT INCLUDE YOUR PROFITS ON BROKERAGE?"

"MR. LUCAS: WHAT IS THE TOTAL AMOUNT." (Referring to discounts and brokerage).

"MR. GUNDREY: THE TOTAL AMOUNT IS $6,105,000, PLUS BROKERAGE EARNINGS OF ABOUT $2,000,000.

"MR. LUCAS: THEN YOU HAVE $8,105,000 IN REBATES AND BROKERAGE?"

"MR. GUNDREY: I SHOULD SAY, IN ROUND FIGURES."

At this same hearing it was also brought out that no special record was kept by the Great Atlantic & Pacific Tea Company of the manner in which it disbursed these special discounts.

These special rebates and brokerage give to the Great Atlantic & Pacific Tea Company a per store advantage of more than Five Hundred and Thirty ($530.00) Dollars per annum (year 1934), which in the nature of things cannot be obtained by small chains such as the H.

G. Hill Stores, local wholesale grocers, and other independent retail units.

(b) The Great Atlantic & Pacific Tea Company (and other large chains) operates its own brokerage companies which exact from those who would trade with it an additional sum of two million dollars per annum (year 1934) over and above the secret and confidential allowances and rebates received by it (See Report of Special Committee of the House of Representatives referred to previously) - - - Independent units and small chains cannot and do not obtain similar brokerage commissions.

(c) In addition to these special benefits amounting to $8,105,000 the sheer weight of the enormous purchasing power of the Great Atlantic & Pacific Tea Company places it in a buying position vastly more favorable than that of independent units and small chains. It is with difficulty that the tremendous purchasing power of this chain and other similarly situated can be visualized. It will, however, suffice to point out the size of some of its purchases:

1. PURCHASED 210 MILLION POUNDS OF BUTTER. (calendar year 1934).
2. PURCHASED SEVEN MILLION FIVE HUNDRED THOUSAND HENS. (calendar year 1934).
3. OTHER PURCHASES MADE ON EQUALLY GRAND SCALE.

The advantages gained as a consequence of this great purchasing power manifest themselves in many ways and cause the operations of the great chains such as the Great Atlantic & Pacific Tea Company to differ basically from those of the small chain, the local wholesaler and independent retailer. The following illustration will serve

to indicate one of the many benefits which flow from such a large purchasing power as is possessed by the Great Atlantic & Pacific Tea Company and other similarly situated chains. - - - ILLUSTRATION:

> A canner having a surplus of, let us say, ten thousand cases of canned goods would and will sell this block of merchandise in its entirety to one of the great chains such as the Great Atlantic & Pacific Tea Company for a measurably lesser figure than he would to the local wholesaler, the independent retailer or a chain the size of the H. G. Hill Stores, whose requirements would only permit the purchase of only a portion of the canner's surplus stock, say five hundred or one thousand cases. This is true because the canner by selling the entire surplus is enabled to immediately release the monies which he has tied up in this merchandise and also eliminate all further sales expense and effort.

(d) The operations of the Great Atlantic & Pacific Tea Company and other large chains are nationwide in scope, extending even into the Dominion of Canada. As a result of this broad geographical spread, the Great Atlantic & Pacific Tea Company is not dependent upon the prosperity or lack of prosperity of isolated communities. The insurance and safety afforded by this geographical spread cannot be enjoyed by small chains or independent units.

(e) The nationwide scope of the Great Atlantic & Pacific Tea Company, and to a lesser extent, certain other large chains permits the use of national advertising, particularly radio broadcasts on chain hookups and the employment of talent of the highest caliber, the cost of which would be prohibitive to the small chain and the wholesale grocer or the independent merchant. It is further to be noted that the advertising of

the Great Atlantic & Pacific Tea Company for several years was conducted without cost to the Company, they having received the equivalent of their advertising expenditures in the form of secret rebates and allowances. (See Special Investigation, American Retail Federation, House of Representatives).

(f) The Great Atlantic & Pacific Tea Company's size and great purchasing power permits the organization of a buying department having twelve (12) field offices dotted throughout the country, each located at the primary markets for the important commodities and items which it purchases.

(1) Each field office is in charge of a specialist and these offices are supervised by the Company's central purchasing department in New York, which co-ordinates their activities. The field offices are, as pointed out above, located in the principal center of production and primary markets for the commodities which the Company requires. Illustrative of this is the fact that the California purchasing office buys all of the canned fruits and canned fish; most of the supply of these products for the United States being packed in that geographical area. The Louisiana office purchases the entire rice requirement for the entire chain as the market for this commodity is located in the State of Louisiana. Similarly, the Chicago office which is located in the heart of the section where peas and corn are canned, likewise purchase the chain's entire requirement of these articles. The other field buying offices are located to equal advantage for the products that they buy.

(2) The cost of this plan of operation would be prohibitive to any company or companies unless they be possessed of purchasing power

such as that which the Great Atlantic & Pacific Tea Company possesses or at least vastly greater than that which is possessed by small local units not nationwide in scope. This scheme of operation results further in the Great Atlantic & Pacific Tea Company being able to keep more closely attuned to the prices and supply of the commodities which it requires and to build up statistical data and information as to the markets and market conditions, which would be prohibitive to small chains, local wholesalers and the independent retailer.

(g) Enormous purchasing power permits The Great Atlantic & Pacific Tea Company and other large chains to manufacture and can many of the articles which they sell at retail. This results in an integrated operation which places the large chain in a different situation from that of the small chain, local wholesaler or independent retailer. By manufacturing a substantial portion of its requirements it can convert into a profit many of the costs (manufacturer's profit, sales expense, etc.) which are passed on to the small chain, local wholesaler or independent retailer. The importance of the manufacturing activities of the Great Altantic & Pacific Tea Company can be better judged when it is realized that they manufacture;

80,000 TINS OF SALMON DAILY,

2,000,000 POUNDS OF BREAD DAILY,

500,000 CANS OF EVAPORATED MILK DAILY,

72,000 JAMS AND PRESERVES DAILY,

and

INNUMERABLE OTHER ARTICLES ON A SIMILARLY GRAND SCALE.

One of the many benefits derived from these manufacturing activities can be illustrated, at least in part, in the following fashion:

> A large chain such as the Great Atlantic & Pacific Tea Company can operate and use the entire output of a plant operated for the purpose of canning evaporated and condensed milk. This plant can be operated on a competitive basis with those which exist in other canneries of evaporated or condensed milk. On the contrary, a chain the size of the H. G. Hill Stores or the largest wholesale grocer in New Orleans could not profitably maintain a similar canning plant since its total requirements would be insufficient to admit of the operations of such a cannery, on competitive price basis as its requirements would be too limited. The same illustration holds with equal force insofar as other items such as peas, corn, salmon, condiments, ketchup, jams, preserves and many other items are concerned, from which it can be seen that the Great Atlantic & Pacific Tea Company or other large chains are enabled to profitably take the entire output of a factory owned and operated by them and thereby secure not only the manufacturing profit but eliminate the selling costs. The small chains as the H. G. Hill Stores or other local wholesalers or independent retailers would have to pay the manufacturer's selling costs to the manufacturer or canner from whom they purchase these competitive items. These manufacturing profits and selling costs are considerable and would result in their having to pay a price different from that which would be paid by the Great Atlantic & Pacific Tea Company and other large chains, for similar articles.

(h) The Great Atlantic & Pacific Tea Company through its wholly owned subsidiary, The Ameri-

can Coffee Corporation, is the largest coffee merchant in the world. It purchases its own coffee in South America, imports it, roasts it and sells it itself. It has offices and agents in Columbia contracting planters and supervising crops in Brazil. For these reasons The Great Atlantic & Pacific Tea Company is able to sell coffee for measurably lower prices than it would be possible for independents or small chains. Only the sales volume of The Great Atlantic & Pacific Tea Company permits the profitable operation of its coffee subsidiary, The American Coffee Corporation. No small chain or independent unit could operate a subsidiary coffee corporation of this type to purchase coffee on the same basis as The Great Atlantic & Pacific Tea Company can as a result of its ownership and operation of the American Coffee Corporation. This assumes great importance inasmuch as coffee has long been recognized as one of the best grocery leaders and the value of this coffee subsidiary is reflected not only in the coffee purchases but also in the purchase of other grocery items.

(i) The effect of these advantages on the profits of large chains having enormous purchasing power and doing a tremendous volume of business throughout the country is best illustrated by the photostatic copies of tables which are appended hereto and made part hereof. (See original record in this case). These tables are found in Senate Document No. 87, 73rd Congress, 2nd Session, Brochure, Chain Stores Invested Capital and Rates of Return of Retail Chains, and represent comparisons of results obtained by small retail grocery chains and those of great magnitude. They prove conclusively that when a retail grocery chain possesses more than one thousand units it has, in the main, double the profit possibility possessed by small chains or independent

grocery units and they also show that the investment per unit diminishes in accordance with the size of the chain and that chains possessing more than one thousand units have a materially smaller investment per unit than those of small chains.

(j) The large chains make it a fundamental rule of operating policy to acquire little, if any real estate in the communities in which they are doing business. Your affiant is informed and believes that the Great Atlantic & Pacific Tea Company does not own a single piece of real property in the State of Louisiana, not even its warehouse, whereas the H. G. Hill Stores, Inc. has substantial sums invested in real estate as do virtually all of the independent retailers and wholesale jobbers operating in this area.

I have read the affidavit signed by one David G. Bofinger, executed on January 2, 1936, wherein the said Bofinger states that he is of the opinion that the H. G. Hill Stores receive "allowances and discounts as great as those received by the Great Atlantic & Pacific Tea Company on the great bulk of their purchases, if not on all of them." This statement is erroneous and untrue. The allowances, rebates, discounts and special advantages reaped by the Great Atlantic & Pacific Tea Company are many times greater than those received by the H. G. Hill Stores when computed and compared on a per store basis, on the basis of dollar sales, in the aggregate, or on any other basis of comparison that may be used.

My information as to the special allowances, rebates, discounts and simulated brokerage profits of the Great Atlantic & Pacific Tea Company was obtained from

the testimony adduced at the Congressional investigation conducted during the months of June and July, 1935, and sometimes styled the Patman Investigation. At and during the course of this investigation, duly accredited representatives of the Great Atlantic & Pacific Tea Company testified and the record reveals with absolute certainty that this corporation (the Great Atlantic & Pacific Tea Company) did obtain special discounts, allowances, rebates and simulated brokerage profits in excess of the sum of eight million dollars and there was additional evidence to corroborate the fact that these were not all of the concessions received by the Great Atlantic & Pacific Tea Company. The uncontroverted testimony further shows that the Great Atlantic & Pacific Tea Company, because of its tremendous purchasing power, stands in a class by itself and does receive quantity discounts which are unavailable to concerns of small stature as the H. G. Hill Stores, Inc., which concern possesses but eighty-six (86) units as contrasted with the fifteen thousand two hundred (15,200) units contained in the Great Atlantic & Pacific Tea Company chain. The effect of these discounts, allowances, rebates, etc., is to give a per store advantage many times greater than a concern such as the H. G. Hill Stores or any other similar company can possibly receive. In fact, on the basis of the Great Atlantic & Pacific Tea Company receiving an allowance of eight million dollars as a consequence of these concessions, special discounts, and brokerage fees, this sum gives to it a per store allowance of more than Five Hundred Dollars ($500.00) per unit for each and every one of the fifteen thousand and two hundred (15,200) units embraced in its chain, which is again many times more than the allowances and discounts applicable to the individual units

of the H. G. Hill Stores. These concessions, rebates and brokerage fees when computed on the basis of dollar sales, give to the Great Atlantic & Pacific Tea Company again an advantage many times greater than that of the H. G. Hill Stores.

In addition to these concessions, rebates and brokerage fees, the Great Atlantic & Pacific Tea Company enjoys further advantages in that it manufactures many of the articles that it sells and reaps a further profit which is not available to the small units such as the H. G. Hill Stores, Inc.

The foregoing is not designed to be a compendium of all of the vast differences that exist between operators of the type of the Great Atlantic & Pacific Tea Company and that of a chain having an infinitesimal number of units, by comparison with that of the Great Atlantic & Pacific Tea Company.

There are numerous other differentiating factors but I believe that the foregoing suffices to show that any comparison of the operations of the Great Atlantic & Pacific Tea Company with that of a small chain is inaccurate, misleading and unfair unless the foregoing factors be taken into consideration.

Jas. T. Burns (R. p. 250).

All of the retail units in a chain contribute to the purchasing power enjoyed by each unit in the chain, irrespective of the location of the retail units. Chain store tax, with the rate fixed by the number of retail units in the State, does not properly classify the chain according

to the type of business done, or the privilege enjoyed in the State of Louisiana, for the reason that all of the units in the entire chain contribute to and increase the per unit advantage of each unit in Louisiana.

I am a resident of the Parish of St. Tammany, Louisiana, and since 1932, I have represented said Parish in the House of Representatives of the Legislature of Louisiana, and was a co-author of Act 51 of 1934.

Lorris M. Wimberly (R. p. 252).

I am a resident of Bienville Parish, Louisiana, and since 1928, I have represented said Parish in the House of Representatives of the Legislature of Louisiana.

Since 1928, and some time prior thereto, I have observed the rapid growth and development in Louisiana of chain stores; I have made a study, the beginning of which dates back prior to 1928, of the effect of the rapid growth of chains, and their methods, upon the independent retailers in the State of Louisiana, and the effect of the methods of doing business practiced by the larger chains, as related to the smaller chains.

Since 1920, I have seen the various national chain organizations with their enormous purchasing power, and other advantages accruing by virtue of their operation of multiple units, come into the City of Shreveport, in the Parish of Caddo, Louisiana, and because of their ability to undersell the independent merchants, have forced the independent merchants in said City, to a large extent, out of business, this being especially true of the establishments

formerly located on Texas Street, in the City of Shreveport, which street was the principal avenue of business in 1930, and that now instead of said businesses on said street being independently owned by the citizenship of the City of Shreveport and surrounding territory, with few exceptions, the large business houses are operated by national and sectional chains.

These conditions described above also exist in the City of Monroe, Parish of Ouachita, in Northern Louisiana, and in the City of Alexandria, situated in the Parish of Rapides, State of Louisiana, and that now, and for the past three or four years, said national and sectional chains have been extending their operations into the smaller communities and towns and are now competing with the independent merchants in said smaller communities and towns, and that if something is not done to remedy the situation, it will be only a question of time before the same circumstances are existing in the smaller towns and communities as exist in the cities of Shreveport, Monroe and Alexandria, and other cities in Louisiana, that is, the retail business of the towns and communities being practically monopolized by chain operators.

It is the exercise in Louisiana by said chains of the enormous purchasing power created by the great number of units operated by the chain, together with the advertising advantages, discounts obtained by virtue of the enormous purchasing power, reduction to a minimum of overhead operating expenses, the ability to maintain expert buyers in the various fields of production and the many other advantages accruing to the operators of multiple

retail units that enable the chain operators to sell at such prices as render it impossible for an independent retailer or small chain operator to exist.

I know that the greater the number of retail units the greater the purchasing power of the chain, and that each retail unit contributes its pro rata part to the creation of the multiple advantages accruing to the chain operator, the entire number of units being one system with, ordinarily, one central purchasing agency.

I know it was the condition herein described that the Legislature of Louisiana in the passage of Act No. 51 of 1934, sought to remedy.

Since the year 1928, I have been cognizant of the rapid growth and encroachment upon the retail field of chain stores in Louisiana, and recognized the necessity of the Legislature of Louisiana taking such action as is necessary to protect the welfare of its citizenship.

I know that the Legislature, as evidenced by the passage of said Act, and I individually, believe and are of the opinion that the State of Louisiana, in its sovereign capacity, should encourage individual initiative among its citizenship, and individually owned stores, in preference to chain ownership, for the reason that a person makes a better citizen when he owns his own business establishment and is not a mere employee at a meager wage of some gigantic corporation whose officials he does not know, and whose officials do not recognize his needs and wants, and the employees accept work with the organization solely and only because, by reason of the size of the organization, he

is unable to operate as an independent retailer and own his own establishment.

I know that when an individual citizen of Louisiana is unable to operate by reason of chain operations in his respective community, such condition operates against the general welfare of the State of Louisiana, and is a condition that the Legislature of Louisiana should take cognizance of and rectify, and it was these conditions and circumstances that the Legislature had in mind in the passage of the Act attacked in the present litigation.

I believe that the method of arriving at the amount of tax due, as provided in Act No. 51 of 1934, attacked herein, is the fairest method of recognizing the multiple advantages accruing to the operators of a chain system, for the reason that the total number of stores or retail units in a chain determine the rate of the tax, and the greater the number of units the greater the advantages enjoyed.

For example, a chain of fifteen thousand retail units operating throughout the entire United States, with one hundred stores in Louisiana, cannot fairly be classified as operating under the same circumstances as a chain with one hundred stores with all of them situated in Louisiana. On the one hand, the large chain has a central purchasing agency with power and finances to purchase for fifteen thousand retail units, while on the other hand the purchasing power of the smaller chain with one hundred units does not have the financial backing that the larger chain has and is not in a position to obtain the prices nor concessions that can be obtained by the larger chain.

I know that the larger chain could purchase, for example, the entire output of a factory, or buy in train load lots, while the small chain could purchase probably only by car load lots or less. The operator with one hundred units, however, would enjoy an advantage over the operator of a smaller number of units, such as ten units, and the operator of ten units would in turn enjoy a distinct advantage over the operator of an independent establishment. In other words, I know that the larger the number of retail units in the organization, the greater the purchasing power, and the greater the advantages accruing to the operator.

The present chain store tax was enacted by the Louisiana Legislature after careful study and deliberation in both Committee, the House and Senate, and after both the chain organizations and others had had an opportunity to present their side of the case.

James D. Huck, Jr. (R. p. 226).

This witness is a certified public accountant, authorized to practice in Louisiana. His testimony consisted of an analysis of the financial statements offered in evidence by appellants to show wherein the statements filed could not be taken as an accurate account of their Louisiana operations. His testimony involves considerable detail. Should the Court consider the financial statements offered by appellants, which were objected to by respondents, as being irrelevant and immaterial, admissible testimony, the Court is respectfully requested to study the testimony of Mr. Huck.

Objections to Appellants' Testimony.

(See Stipulation, R. p. 81).

Respondents objected to all testimony offered by appellants relating to earnings, gross sales, etc., on the ground same is irrelevant and immaterial and has no bearing on the case. Said objections are here re-urged (See stipulation, R. p. 81). The Legislature is not required, when classifying businesses for the purpose of taxation, to look into the question of whether the tax means the difference between a profit and a loss. See *Fox v. Standard Oil Company of New Jersey, infra.*

The objection was also urged, and is here re-urged, that even if the testimony was admissible, the figures contained in the statements are insufficient to justify the Court in drawing a conclusion therefrom (See stipulation, R. p. 81).

Summary of the Testimony of Charles W. Parr and F. W. Gundrey, Officials of the Great Atlantic & Pacific Tea Company.

[See stipulations (R. pp. 83, 84); also Hearing before a Special Committee of House of Representatives of United States Investigating American Retail Federation, 74th Congress, 1st Session, during months of June and July, 1935, pages 429-501].

The Great Atlantic & Pacific Tea Company is a foreign corporation, operating 15,200 retail grocery stores, with Headquarters in New York City. The capital stock consists of a small issue of preferred, and approximately two million shares of common. Seventy-five per cent of

common stock is owned by the Hartford family, which family controls the company.

The Great Atlantic & Pacific Tea Company has field buying offices in San Francisco, Seattle, Minneapolis, Chicago, Rochester, New York, New Orleans, Baltimore, and two in New York City. These sub-buying offices are situated near the point of production or manufacture.

In 1934, The Great Atlantic & Pacific Tea Company received over $6,000,000.00 in allowances and secret rebates. These did not show on the face of the invoices covering the purchases by the company from manufacturers.

The Great Atlantic & Pacific Tea Company received in brokerage commissions during 1934, $2,000,000.00. The total profit in rebates and brokerage fees made by The Great Atlantic & Pacific Tea Company during 1934, amounted to $8,105,000.00.

In addition to the rebate and allowances referred to above, which do not appear on invoices, The Great Atlantic & Pacific Tea Company received additional rebates, allowances and discounts off the invoices on the various products it purchases.

Because of the enormous purchases made by The Great Atlantic & Pacific Tea Company, it owns and operates its own brokerage agencies near the points of production. The usual brokerage fee is charged by said agencies when purchases are made from producers or manufacturers, and this fee and profit enures to The Great Atlantic & Pacific Tea Company.

The Great Atlantic & Pacific Tea Company, as admitted by Mr. Parr, owns and operates warehouses and does not buy from wholesalers, but buys direct from factories, thereby performing functions of an ordinary wholesaler. The Great Atlantic & Pacific Tea Company, therefore, makes the profit usually made by the wholesaler.

It was admitted by Mr. Parr that The Great Atlantic & Pacfiic Tea Company demands these secret rebates or advertising allowances from manufacturers, and if they are not given, the merchandise manufactured by the person refusing the secret discount or rebate is not "pushed" by the retail units of The Great Atlantic & Pacific Tea Company, and, if possible, the goods are not stocked in its retail units.

Mr. Parr admitted that an independent merchant buying from a wholesaler in smaller lots will pay more for merchandise than one buying in greater quantity from a producer.

The Great Atlantic & Pacific Tea Company in 1934 paid a dividend of $7.00 per share on preferred stock, and $7.00 per share on common stock. To pay the common stock dividend required $14,000,000.00. An amount sufficient to pay more than 50% of this dividend was received by The Great Atlantic & Pacific Tea Company in secret rebates and allowances, viz., $8,105,000.00.

According to the Federal Trade Commission Report, quoted at said Committee Hearing, The Great Atlantic & Pacific Tea Company is the most conspicuous chain which is the sole recipient of straight volume allowances, and in

many instances, The Great Atlantic & Pacific Tea Company is the only one receiving allowances from concerns that are selling to other chains. Mr. Parr admitted that the brokerage paid the company's brokerage agencies enures to The Great Atlantic & Pacific Tea Company.

The Great Atlantic & Pacific Tea Company, appellant herein, prepared and filed with a Committee of the House of Representatives of the United States, a list of the manufacturers from whom it purchases merchandise, showing the name of the manufacturer, the type of secret rebate and discount, and in some instances, the amount. This list appears in the Record at pp. 66-79, both inclusive. (See also hearings before Committee of House of Representatives, 74th Congress, 1st Session, held in June and July, 1935, at pp. 464-471, both inclusive; said list forms a part of this Record. See Stipulation (R. p. 83, Paragraph 5) and stipulation (R. p. 84).

Documentary Evidence Offered By Appellees.

Senate Document No. 85, 73d Congress, 2d Session, Page 104. (See Stipulation R. p. 84).

"THE COMPETITIVE ADVANTAGES OF SIZE.—Competition between chain-store companies, or between chain stores and independent merchants, is for the most part of a local character; that is to say, it is competition in the sale of goods at retail to customers whose patronage is largely confined to the locality in which they live, and for that reason both chain and independent competitors are primarily concerned with price comparisons between stores in the same locality. This is well illustrated in the statements which the chains make on questions of

price policy. When asked to give the reasons for price variations between stores, competition is named more often than any other reason. When asked to state who has authority to adjust prices to meet competition, the answers almost invariably reflect some means whereby local competitive situations may be met by local price adjustments.

"In a competitive field made up in this way of numerous more or less isolated competitive points, the retailer who operates a large number of stores situated throughout a wide area enjoys a strategic advantage over a competing retailer who operates fewer stores or whose stores are confined to a more limited area. Such stragetic advantage of the large chain is greater, of course, in competition with the independent retailer who operates only one store. The source of this advantage lies in the fact that the multiple-store retailer has the opportunity of averaging the profit results obtained from its stores in the several localities where it operates. If the store in one locality is operating under severe competitive conditions and producing a net loss, its losses may be, and under normal business conditions probably would be, offset by the profits earned in the other stores.

"To illustrate the advantage of this averaging process to the large chain it may be assumed that in a given locality the number of chain and independent stores attempting to do business is greater than the demand in that community can profitably support. Should one of the independent retailers or one of the local chains initiate price cuts in an effort to obtain what business is available, the large chains are put upon the defensive in that locality. It is obvious that they can meet the reduced prices of their competitors and continue the operation of their stores in that locality almost indefinitely if, as would usually be the case, they are

operating stores in other localities where competition is less vigorous. The profits obtained from those other stores will enable the larger chains to survive the price warfare in the particular community for a longer period than any of the local competitors. If, as another illustration, it be assumed that the large chain takes the initiative in price cutting in a given community and cuts its prices below those of its local competitors, the profits derived from its other stores where such price reductions have not been made will enable it to continue to undersell the local stores for as long a time as the latter may be able to remain in business.

"As between chains of approximately equal number of stores and with equally wide distribution the averaging process affords no advantage, except in particular cases where one such chain happens to have fewer of its stores located in highly competitive localities than the other chain. It is between large chains and small chains and between chains and independent retailers that the averaging process becomes a significant competitive factor, and the essence of the process is the opportunity which it affords a large chain to derive revenue from one store or group of stores with which to conduct either defensive or offensive competitive warfare in other stores or groups of stores. The reserves and resources of a large chain may be immediately mobilized for offense or defense in any particular locality, but the independent competitors are not so organized as to permit those who are in quiet sectors to come to the aid of those who are in competitive difficulties.

"To this contention that the large chain enjoys a strategic advantage over its smaller, or more local, competitors it may be replied that the widespread activity of the large chain brings a compensating disadvantage in that it encounters competi-

tive price cuts and price wars at a greater number of points. This is undoubtedly true as a statement of fact, but it is not an offset to the advantage which the large chain derives from the averaging process. The smaller competitor may encounter such conditions less often than the larger chain, but when it does encounter them they are of relatively much greater importance to its total business. It is the fact that any severe competitive condition, when it occurs, bears much more heavily upon the smaller than upon the larger competitor that gives competitive significance to the averaging process. This fact is not negatived by the statement that for any given period of time the average large chain will encounter a greater number of separate competitive struggles than will any one of its smaller competitors. No one of the localized encounters, nor perhaps all of them put together, will affect so large a proportion of the chain's business as is affected for each of the independent competitors involved."

Senate Document No. 4, 74th Congress, 1st Session, Page 5. (See Stipulation).

"The three national grocery-store chains—the Great Atlantic & Pacific Tea Co., the Kroger Grocery & Baking Co., and the Safeway Stores, Inc. (including MacMarr Stores, Inc., acquired by Safeway in 1931)—operated during 1930 nearly 25,000 retail grocery stores with aggregate sales of almost $1,600,000,000. The Great Atlantic & Pacific Tea Co. alone operated 15,738 of these stores, with total sales of $1,065,000,000 during 1930.

"The significance of these figures is heightened by the apparent tendency of chain stores to increase at a faster rate than independents, • • • This indicates that while the opening rate of independent stores is substantially higher than that for the stores of chains, the independent closing rate is

nearly as high as their rate of openings, whereas the chain rate of closings is roughly one-fourth that of their openings."

In *Senate Doc. No. 4, 74th Congress, 1st Session, page 64*, the Federal Trade Commission states:

> "Much more than a mere possibility and, in fact, a strong probability exists that the effect of price discriminations by manufacturers which make it possible for chain stores consistently to undersell their independent competitors 'may be to substantially lessen competition' between them and 'tend' to the creation of a monopoly."

Senate Doc. No. 4, 74th Congress, 1st Session, containing the final report of the Federal Trade Commission on its chain store investigation, at *page 78*, states:

> " - - - There has been a wide recognition, however, of the economic problem involved in the growth and threatened dominance of chain distribution, which is but one phase of the problem of monopoly."

In *Senate Document No. 4, 74th Congress, 1st Session*, at *page 86, Section 1*, the Federal Trade Commission, in part, states:

> "Should the trend of the past 20 years and particularly of the last decade continue for a like period, we shall have a condition in some lines of chain-store merchandising that few will dispute is monopolistic."

Summary of Argument.

Act 51 of 1934 levies a license or privilege tax on the privilege of operating a retail store or stores in multiple form in Louisiana. It is within the authority of Legis-

lature of Louisiana to levy this license or privilege tax on this privilege of engaging in intrastate business in Louisiana.

Act 51 of 1934 classifies businesses according to type of business done, and value of privilege to do business in Louisiana.

The measure of the tax is the number of retail stores in Louisiana.

The type of business transacted in Louisiana and the value of the privilege to operate each retail store in Louisiana is determined by the number of retail stores under the same general management, supervision, ownership or control.

The greater the number of retail stores in a chain, the greater the many advantages accruing to the operators of the chain, and the greater the advantages accruing to each retail unit in the chain, thereby determining the type of business the retail store is engaged in, and the value of the privilege of doing business in Louisiana.

Under Act 51 of 1934, the rate of the tax alone is affected by the total number of retail stores in the chain.

The retail stores operated by appellants in Louisiana are part of a system; the state can look beyond borders to determine the true value of properties in Louisiana when all are part of a system.

The Louisiana Statute should be sustained on further ground that all appellants are foreign corporations doing intrastate business in Louisiana.

In the alternative, the Louisiana Statute, in effect, classifies chain operators in Louisiana as local, sectional and national chains.

Rate of tax fixed by number of retail units applies only to chain stores.

POINT I.

Act 51 of 1934 levies a license or privilege tax on privilege of operating retail stores in multiple form in Louisiana, clearly within authority of Louisiana Legislature.

Section 8, Article 10, of the Constitution of Louisiana for the year 1921, in part, follows:

> "License taxes may be levied on such classes of persons, associations of persons and corporations pursuing any trade, business, occupation, vocation or profession, as the Legislature may deem proper, except clerks, laborers, ministers of religion, school teachers, graduated trained nurses, those engaged in mechanical, agricultural, or horticultural pursuits or in operating saw mills. Such license taxes may be classified, graduated or progressive."

Acting under the authority vested in it by said Section and Article of the Constitution of the State, the Legislature passed Act No. 51 of 1934. The title of said Act clearly shows it was the intention of the Legislature of Louisiana to levy a license tax under the authority of said Section and Article of the Constitution. The title of said Act follows:

> "An Act to levy an annual license tax on all persons, firms, partnerships, corporations or associa-

tions of persons engaged in the business of operating two or more stores or mercantile establishments, one or more of which is located in this State, where goods, wares, merchandise, or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores, under Section 8 of Article X of the Constitution of 1921; and providing penalties for the violation of this Act; and making an appropriation and distribution of said funds."

Section 1 of said Act states that:

"Section 1. Be it enacted by the Legislature of Louisiana, That because of the advantages accruing from the operation of multiple stores wherever situated, and because of the basic difference inherent in such character of operations, there be and is hereby levied an annual license tax for the year 1935 and for each subsequent year upon each person, firm, partnership, corporation or association of persons engaged in the business of operating or maintaining, as part of a group or chain, any store or stores in this State, where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores."

It is evident, after reading the Constitutional Provision under which the statute was enacted by the Legislature, together with the statute itself, that the Legislature of Louisiana levied an occupational, license or privilege tax on the privilege of operating retail stores in Louisiana. It is in no sense a property tax. It is levied on the right to exercise an intrastate privilege within the State of Louisiana.

POINT II.

Statute classifies businesses according to type of business done, and value of privilege to do business in Louisiana; measure of tax is number of retail stores in State; type of business transacted in Louisiana and value of privilege to do business in Louisiana determined by number of retail stores under same general management, supervision, ownership or control; greater the number of retail units in a chain, the greater the many advantages accruing to the operators of the chain, and the greater the advantages accruing to each retail unit in the chain, thereby determining the type of business the retail unit or units are engaged in, and the value of the privilege of doing business in Louisiana.

Act 51 of 1934 levies a license or privilege tax on each unit operated in Louisiana belonging to a chain system. The measure of the tax, under the statute, is the number of units operated in the State of Louisiana. The Legislature has classified the business of operating retail chain units according to the type of business done in Louisiana, and according to the value of the privilege of conducting such business. The type of business done, and the value of the privilege of operating in Louisiana, are based on the multiple advantages accruing to the operators of retail chain units, and the basic differences inherent in such operations, and the advantages behind each store operated in the chain in Louisiana.

In order to arrive at the type of business done, the value of the privilege to do business in the State of Louisiana, and to arrive at the value of the multiple advantages accruing to the operators of multiple units and to each store operated in Louisiana, and in order to arrive at the

extent of the basic differences for the purpose of classification, the Legislature of Louisiana has reached the conclusion that this classification can be made fairly, the type of business most accurately classified, and the advantages accruing to each store operated in Louisiana in the chain, by basing the rate of the tax on the entire number of units making up the chain system.

The fact that the Louisiana Legislature looks to the entire number of units in the chain in arriving at the rate of the license or privilege tax on each unit in Louisiana is merely permitting all the units to affect the rate of the license or privilege tax. It in no manner taxes property outside the State of Louisiana, as contended by appellants.

The testimony and evidence offered by appellees and appearing in the record, together with the jurisprudence established by this Court, as will be discussed hereinafter, clearly and emphatically show that, as a general proposition, the greater the number of units in a retail chain, the greater the many advantages enjoyed by the entire organization, and the greater the value of the privilege of doing business in that form, and the greater the per unit advantage behind each store.

Chains operating, for example, 100 retail units, enjoy as a general proposition, the same discounts, the same secret rebates, the same reduction in cost of transportation, the same purchasing power, the same low cost in administration, the same opportunities to establish new retail units in territories not theretofore covered, and the same opportunity to carry the new units at a loss until they are established, making up for that loss by increasing prices in other fields where monopolies or near monopolies have already been established.

Similarly, chains of 50 stores have a very definite and fixed advantage which they have in common, and which definitely marks the type of merchandising that they do. The greater the number of units in a chain, the greater the advantages, and the greater the value of the privilege of operating each unit or retail store in Louisiana.

If a national chain has one unit in Louisiana, the per unit advantages accruing to it by reason of the fact it is a part of a chain, or system is just as much behind it, and increases the value of the privilege to operate the one unit and determines the type of business it does, just as much as if all the units were located in Louisiana, if not more. For example, Walgreen, probably the largest drug chain in the United States, has recently opened its only unit in Louisiana, at Shreveport. Who would contend that this one unit at Shreveport, the only unit in Louisiana, is not a chain store? Walgreen has approximately 500 stores in its chain. The rate of tax on the Louisiana unit under the statute is fixed by the total number of units in the chain. By dividing the total amount of money reaching the treasury of this chain by reason of its size, such as discounts, allowances, less cost of operation, lower transportation costs, less advertising costs, etc., by the number of units in the chain, you have the per unit advantage created and made possible by all the units being operated as a system, and the profit per unit after said division is just as much behind the unit at Shreveport, and gives it the same advantages, if not more, as would accrue if all the units were in Louisiana. Walgreen, under the statute, would pay for only the one unit, but the rate would be determined by all the units.

No one would seriously contend that Walgreen, with one unit in Louisiana, and that at Shreveport, is doing the same type of business in Louisiana that an independent drug store operator is doing at Shreveport, with only one store. Such a contention would be absurd! Nor would anyone seriously argue that the privilege to do business in Louisiana enjoyed by Walgreen for the one unit is not worth more than the privilege enjoyed by the druggist who operates one store only. Yet, if the Louisiana statute arrived at the rate per unit, based on the number of units in the State alone, Walgreen would pay no chain store tax in Louisiana, as it operates only one unit, and yet it is a component part of one of the world's largest drug chains! Such a condition would be unfair, and cannot be taken as a fair classification.

Say, for example, a resident of Shreveport had only two drug stores, and both of them are in Louisiana. If the rate of tax was determined by the number of units in Louisiana alone, he would pay a chain store tax, and would be competing with Walgreen, who would pay no chain store tax, yet Walgreen belongs to one of the largest, if not the largest, drug chains in the United States, and the unit at Shreveport enjoys its proportionate share of the advantages created by the entire chain.

This Walgreen illustration conclusively shows the fairness of the classification of the Louisiana Statute based on the value of the privilege to do business in Louisiana, and the type of business done. The only way to accurately determine this, and to take into account the advantages actually enjoyed, is to determine the rate by the units in

the chain, as provided in the Louisiana Statute, and measure the tax by the number of units in Louisiana.

The appellants, The Great Atlantic & Pacific Tea Company, operating in excess of 15,000 units, bases its attack on Act 51 of 1934, principally on its allegation that there is no difference in the value of the privilege enjoyed by it, as compared with the H. G. Hill Stores in New Orleans.

Certainly, the allegations in the bill of complaint filed by the Great Atlantic & Pacific Tea Company, to this effect, cannot be taken seriously. There is, in fact, very little similarity in the method of operation of the Great Atlantic & Pacific Tea Company as compared with the H. G. Hill Stores. It is not necessary at this point to restate the facts disclosed by the testimony of appellees' witnesses, the documentary evidence offered by appellees, and the testimony of Mr. Parr and Mr. Gundrey, officials of the Great Atlantic & Pacific Tea Company. On secret rebates and allowances and brokerage fees alone, the Great Atlantic & Pacific Tea Company enjoys a $530.00 per unit advantage in Louisiana over those not receiving those discounts. The many other advantages shown by the record can be analyzed to show the per store advantage of the complainant.

The Court, with respect, is urged to examine the list of manufacturers appearing in the record at pages 66-99, both inclusive. It lists the names of the manufacturers giving the Great Atlantic & Pacific Tea Company secret rebates not appearing on the invoices, together with the merchandise sold it, and the type of rebate given.

In the writer's opinion, the Court will find the contents of this list very interesting as it reveals, in some respects, the power, or rather the type of operation enjoyed by the Great Atlantic & Pacific Tea Company. The Court should keep in mind that this statement and list were prepared by an official of the Great Atlantic & Pacific Tea Company.

The Great Atlantic & Pacific Tea Company in 1934 paid a dividend of $7.00 per share on Preferred Stock, and $7.00 per share on Common Stock. To pay the Common Stock dividend required $14,000,000. An amount sufficient to pay more than 50% of this dividend was received by The Great Atlantic & Pacific Tea Company in secret rebates, allowances and brokerage fees, viz., $8,105,000.00.

It was admitted by Mr. Parr that The Great Atlantic & Pacific Tea Company demands these secret rebates or advertising allowances from manufacturers, and if they are not given, the merchandise manufactured by the person refusing the secret discount or rebate, is not "pushed" by the retail units of The Great Atlantic & Pacific Tea Company, and, if possible, the goods are not stocked in its retail units. Only organizations of the size of this company can successfully pursue such a policy.

The Federal Trade Commission, in *Senate Document No. 4, 74th Congress, 1st Session*, which was the final report of the Commission to the United States Senate, at *page 85*, enumerated some of the many advantages enjoyed by the operators of chain or multiple retail units. The commission said:

> "Summarizing the facts set forth in the preceding chapters II, III, IV, and V, it may be stated that the chief advantage enjoyed by the chain store is

its lower selling prices to consumers. These lower selling prices are largely due to a variety of factors, which may be divided into two classes: First, those which appear to be amenable to ordinary governmental regulation, and, second, those which would be amenable only to extraordinary governmental measures. Among the former class may be mentioned:

1. The usually lower buying prices of chains as compared with independent wholesalers or retailers, much of which is often the result of special discounts and allowances to chains. These discounts are sometimes based upon specified quantity purchases or definite quotas of increase in purchases or to reimburse the chains for newspaper-advertising expenditures on the manufacturer's product. In other cases, however, they may masquerade as brokerage fees or advertising allowances.

2. The extensive use by the chains of large proportions of leader and loss leader merchandise sold at prices which are below the average cost of doing business plus the cost of the merchandise and which are sometimes below the latter.

3. More extensive short and less extensive overweighing by chains in some localities than by independent stores on commodities sold by weight.

"Among the second class, those factors which would be amenable only to extraordinary measures, may be mentioned:

(a) The less service given to customers by chain stores as compared with independents on the average;

(b) The indicated lower wages paid by the chains in some localities at the time of the inquiry;

(c) Elimination by the chains of most of the wholesale selling expense commonly involved in the wholesaler-retailer system of distribution;

(d) The wider profit margins on chain-store purchased and especially manufactured private-brand merchandise as compared with standard brands, which advantage may at times contribute to the ability of the chains to reduce prices through loss leaders or otherwise, particularly on standard-brand goods, private brands being seldom used as leaders;

(e) Profits from wholesaling operations in the case of a number of both the larger and smaller chains which have engaged in this kind of business, which profits may likewise contribute to the lower prices on merchandise sold through retail stores.

(f) In addition, chains in many lines possess an important advantage through their ability to use newspaper advertising where the independent retailer cannot afford to do so. Moreover, the newspaper advertising of the chains tends to be more effective than that of the independents owing to the multiple outlets of the chains in those cases where the chain has more than one store in the area which is covered by the newspaper advertising.

(g) A final and very important advantage of the chain consists in its ability to average the profit results obtained from its stores in various localities, the low prices obtained in one or more areas being offset by the higher prices obtained at one or more other points. This ability of the chain to average its prices and profits may contribute materially to its ability to use leaders and loss leaders effectively."

The many advantages accruing to operators of chain stores, as shown by the testimony and evidence offered by appellees, and as found by the Federal Trade Commission, result from the fact that there are many units or retail stores operated under the same general supervision, owner-

ship or control. Each unit or retail store is an outlet, and contributes its proportionate part to the whole system, and all units or retail stores make the many advantages of so operating possible. There is a definite and substantial advantage behind each unit or retail store capable of calculation, and the only possible way to fairly arrive at the worth of this advantage is by taking into consideration the entire number of units in the chain. In the case of The Great Atlantic & Pacific Tea Company, on one item alone, that of secret rebates and brokerage fees, each retail unit in Louisiana has a cash advantage of $530.00, almost the amount of the tax per store in Louisiana.

Louisiana has sought under the statute involved to tax a privilege purely intrastate in character. It has levied a tax on the privilege of operating a retail store or stores in the State which are a part of a chain or system. The measure of the tax is the number of retail stores operated by the chain in the State. Only the rate is determined by the number of stores in the entire chain. This Court has already held that, broadly speaking, the opportunities and power of a chain become greater with the number of the component links, and the greater they become, the more far reaching are the consequences, both social and economic. See *Fox v. Standard Oil Company of New Jersey, infra.*

The three judge court which rendered the opinion in the case at bar emphatically held, as shown by the findings of fact and conclusions of law (R. p. 263) and the opinion, that the State of Louisiana proved in the testimony and evidence it submitted that the retail units operated in

Louisiana by appellants are a part of a chain or system, and that all of the retail stores of a retail chain contribute to the central purchasing power irrespective of the location of stores, and that all of the retail stores in the chain increase the per unit multiple advantages enjoyed by each store and the operator of the system. The lower court further found that the testimony and evidence offered by the appellee conclusively showed that the greater the number of units in a chain the greater the purchasing power, the greater the secret rebates and allowances the greater the advantage in advertising, the greater the capital employed, the greater the social and economic consequences and the lower the cost of distribution and overhead.

The lower court further definitely held that the testimony and evidence offered by the State of Louisiana in the case at bar conclusively proved the difference in the type of operation between the operator of one store and the operator of many stores, and the difference in the type of operation, varying with the number of units in the chain, and further that the testimony and evidence offered by the State of Louisiana showed the difference in the method of operation in the Great Atlantic & Pacific Tea Company in Louisiana as compared with the H. G. Hill Stores. The lower court further held that the evidence and testimony offered by the State of Louisiana in the case at bar showed the contribution to the advantages made by each unit in a system of chain stores, and the per unit advantage made possible by the whole system.

Contents of Record—Indiana Case.

The testimony, documentary evidence and offerings in this case include practically the same proof found in the original chain store tax case, *State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, 51 S. Ct. 540.* In addition, the record shows the contribution to the advantages made by each unit in the chain, and the per unit advantage made possible by the whole system.

The advantages named by the Court in the Indiana case, as establishing the difference in the type of operation between the operator of one store and the operator of many stores, and the difference in the type of operation, varying with the number of units, were quantity buying, which involves the application of the mass process to distribution, comparable to the mass method used in production; buying for cash and obtaining the advantages of cash discounts; skill in buying, so far as not to overbuy, and at the same time keep the stores stocked with production suitable in size, style and quality for the neighborhood customers who patronize them; distributing from a single warehouse to various stores; abundant supply of capital, whereby advantages may be taken of opportunities to establish new units; a pricing and sales policy different from that of the independent store owner, involving lower prices; a greater turnover and constant analysis of the turnover to ascertain profits on the varying items; uniform and, therefore, cheaper and better advantages for the entire chain in a given locality; standard forms of display for the promotion of sales, superior management and methods, concentration of management in the special lines of goods handled by the

chains; proportional accounting methods; standardization of store management, sales policy and goods sold.

This Court, in the *Indiana* case, *supra*, in discussing the right of the state to classify chains according to the number of units in the chain, said:

> "The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892; Southwestern Oil Co. v. Texas, 217 U. S. 114, 30 S. Ct. 496, 54 L. Ed. 688; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction. American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman, 240 U. S. 342, 36 S. Ct. 370, 374, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350. As was said in Brown-Forman Co. v. Kentucky, supra, at page 573 of 217 U. S., 30 S. Ct. 578, 580:
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> "'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license

tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the Legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear.

"In American Sugar Refining Co. v. Louisiana, supra, a license tax imposed upon persons and corporations carrying on the business of refining sugar and molasses, which excepted planters and farmers grinding and refining their own sugar and molasses, was held not to work an unconstitutional discrimination.

"In Cargill v. Minnesota, 180 U. S. 452, 21 S. Ct. 423, 45 L. Ed. 619, a state statute requiring the proprietors of warehouses situated on the right of way of a railroad to secure a license from a state commission, and containing no such requirement with respect to warehouses not so situated but doing exactly the same business, was held valid.

"In Armour Packing Co. v. Lacy, 200 U. S. 226, 26 S. Ct. 232, 50 L. Ed. 451, a North Carolina statute imposed an occupation tax upon every meat-packing house doing business in that state. The Armour Company which was taxed under this statute had its packing house at Kansas City and shipped its packed products to various depots in the state, where they were sold and delivered in competition with wholesalers and commission merchants were

not required to pay the tax. The statute was sustained.

"In Quong Wing v. Kirkendall, supra, a statute of Montana imposing a license fee on hand laundries was held not to constitute a denial of the equal protection of the laws because it did not apply to steam laundries, and because it exempted from its operation laundries not employing more than two women.

"In Bradley v. Richmond, 227 U. S. 477, 33 S. Ct. 318, 57 L. Ed. 603, an ordinance imposed a tax on the conduct of various businesses and gave a power of classification to a committee of the council. That committee classified private bankers, placing a tax of one amount on certain of them and of a different amount on others. It appeared that the business of those in the one class was that of lending money at high rates upon salaries and household furniture, while that done by the other class was that of lending money upon commercial securities. The classification was held not to offend the constitutional provision for equal protection of the laws.

"In Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 33 S. Ct. 441, 443, 57 L. Ed. 730, an ordinance classified theatres for license fees based on and graded according to the admission charged. It was shown that some of the theatres charging a higher admission had less revenue than those charging a smaller price, and therefore paying lower license fees. This Court held the classification valid.

"In Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 34 S. Ct. 493, 497, 58 L. Ed. 974 there was drawn in question a statute of Alabama which provided that every person, firm, or corporation selling or delivering sewing machines in person or through agents should pay a tax of $50 annually for each county in which they might sell or deliver said articles, and for each wagon and team used in delivering or displaying the same an additional sum

in each county of $25 annually. It exempted merchants selling sewing machines at their regularly established places of business. The Singer Company, a foreign corporation, was engaged in many counties in the state in selling and renting sewing machines, in part from regularly established places of business and in part by means of wagons going from place to place in counties where its stores were located. It attacked the statute on the ground that it involved an arbitrary discrimination between merchants selling at their stores and merchants selling by means of wagons. It was shown that the merchants who sold at their stores usually delivered the articles sold by wagon. This Court sustained the tax, saying with respect to the two kinds of business:

> " 'But there is an evident difference, in the mode of doing business, between the local tradesman and the itinerant dealer, and we are unable to say that the distinction made between them for purposes of taxation is arbitrarily made. In such matters the states necessarily enjoy a wide range of discretion, and it would require a clear case to justify the courts in striking down a law that is uniformly applicable to all persons pursuing a given occupation on the ground that persons engaged in other occupations more or less like it ought to be similarly taxed.'

"In Rast v. Van Deman, supra, a statute placing taxes additional to the usual occupations taxes on persons who offered, with merchandise bargained or sold in the course of trade, coupons, profit-sharing certificates, or the like, was attacked as being arbitrary and unreasonable, in that the only difference between the other merchants and those who used trading stamps was a difference in the method of advertising. This Court said, however:

> " 'The difference between a business where coupons are used, even regarding their use as a

means of advertising, and a business where they are not used, is pronounced. Complainants are at pains to display it. The legislation which regards the difference is not arbitrary within the rulings of the cases. It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it. * * *'

"In Armour & Co. v. Virginia, 246 U. S. 1, 38 S. Ct. 267, 269, 62 L. Ed. 547, the statute under attack laid a tax on merchants doing business in the state based on the amount of their purchases during the license period, including as purchases all goods and merchandise manufactured by the licensee and sold or offered for sale in the State. It excluded from its operation domestic manufacturers, taxed on capital, who offered for sale at the place of manufacture goods and merchandise manufactured by them. It applied alike to citizens and residents of Virginia and non-citizens and non-residents who manufactured in Virginia. The State Supreme Court (118 Va. 242, 87 S. E. 610) held that it applied to Armour & Co., who manufactured part of their products without the state and sold them within it. This Court said:

" 'In the first place we are of opinion that the distinction upon which the classification in the statute rests between a manufacturer selling goods by him made at their place of manufacture and one engaged as a merchant in whole or in part in selling goods of his manufacture at a place of business other than where they were made is so obvious as to require nothing but a mere statement of the two classes. All question concerning the equal protection clause of the Fourteenth Amendment may therefore be put out of view.'

"In view of the numerous distinctions above pointed out between the business of a chain store

and other type of store, we cannot pronounce the classification made by the statute to be arbitrary and unreasonable. That there are differences and advantages in favor of the chain store is shown by the number of such chains established and by their astonishing growth. More and more persons, like the appellee, have found advantages in this method of merchandising and have therefore adopted it. What was said in Metropolis Theatre Co. v. Chicago, supra, is quite applicable here:

> "'* * * The distinction obtains in every large city of the country. The reason for it must therefore be substantial; and if it be so universal in the practice of the business, it would seem not unreasonable if it be adopted as the basis of governmental action.'
>
> "The court below fell into the error of assuming that the distinction between the appellee's business and that of the other sorts of stores mentioned was solely one of ownership. It disregarded the differences shown by the record. They consist not merely in ownership, but in organization, management, and type of business transacted. The statute treats upon a similar basis all owners of chain stores similarly situated. In the light of what we have said, this is all that the Constitution requires. Clark v. Titusville, 184 U. S. 329, 22 S. Ct. 382, 46 L. Ed. 569; Magoun v. Illinois Tr. & Savings Bank, 170 U. S. 283, 18 S. Ct. 594, 42 L. Ed. 1037."

The Louisiana statute involved treats all similarly situated alike. This is all that is required by the equal protection clauses of the Federal and State Constitutions. *Ohio Oil Co. v. Conway, 50 Sup. Ct. 310, 281 U. S. 146.* The same rate of tax applies to all chains operating the same number of units. The record clearly shows that the number of units in a chain determines the type of business done by each unit. The Federal Trade Commission de-

termines the size of a chain by the number of units in the chain. See *Sen. Doc. 4, 74 Cong. 1st Sess., Page 16.* The per unit advantage to the chain operator is determined by the number of units in the chain.

The Great Atlantic & Pacific Tea Company alleges that the Louisiana Statute discriminates between it and the H. G. Hill stores. The Great Atlantic & Pacific Tea Company operates in the United States 14,705 retail units (R. p. 83). These units sell the same general type of merchandise (R. p. 84). These 14,705 units are located in 38 states of the union and the District of Columbia (R. p. 84). The Great Atlantic & Pacific Tea Company has retail stores in every state in the union selling the same general type of merchandise with the exception of the following: Utah, Idaho, Colorado, Wyoming, New Mexico, Montana, Nevada, South Dakota, North Dakota and Oregon (R. p. 84). The Great Atlantic & Pacific Tea Company has stores scattered almost uniformly throughout the United States (R. p. 84).

In the states surrounding Louisiana, The Great Atlantic & Pacific Tea Company has 333 stores in Texas, 33 stores in Mississippi, and 3 stores in Arkansas (R. p. 84). H. G. Hill Stores, Incorporated, owns 92 stores in Louisiana and no stores elsewhere (R. p. 211).

The Great Atlantic & Pacific Tea Company and H. G. Hill Stores, Incorporated, are differently classified by Act 51 of 1934. The Great Atlantic & Pacific Tea Company alleges in its bill of complaint that it and the Hill Stores operate business in the same manner, and that the tax levied by Act 51 of 1934, therefore, unjustly discrim-

inates against The Great Atlantic & Pacific Tea Company and in favor of the H. G. Hill Stores.

In connection with this position taken by The Great Atlantic & Pacific Tea Company, the Court, with respect, is urged to carefully consider the testimony and evidence offered by the State of Louisiana, especially the testimony of W. E. Penick (R. p. 225), wherein it is clearly shown that there is a tremendous difference in the manner and method of operation between The Great Atlantic & Pacific Tea Company and H. G. Hill Stores.

The H. G. Hill Stores do not have a sufficient number of retail units to warrant maintaining purchasing offices at the various sources of supply as does The Great Atlantic & Pacific Tea Company, nor does the purchasing power of the Hill Stores enable the operating officials to demand from manufacturers the tremendous rebates, brokerage fees and other allowances demanded and given to The Great Atlantic & Pacific Tea Company. The Great Atlantic & Pacific Tea Company engages extensively in manufacturing (R. pp. 211-218) while the H. G. Hill Stores, Incorporated, do not operate sufficient units to enable it to engage in the manufacturing of any of the products it sells through its retail units. The Great Atlantic & Pacific Tea Company enjoys a distinct advantage in cheaper advertising on a nationwide scale, while the Hill Stores, operating in a small area, are unable to enjoy this privilege (R. pp. 211-218).

These are some of the few advantages enjoyed by The Great Atlantic & Pacific Tea Company over H. G. Hill Stores, Incorporated, and are advantages created solely

and only by reason of the fact that The Great Atlantic & Pacific Tea Company operates the 14,705 retail units. Certainly it cannot be seriously contended that there is no difference in the manner and type of the operation between The Great Atlantic & Pacific Tea Company and the H. G. Hill Stores, Incorporated.

The Louisiana Statute recognizes these vast differences in the methods of doing business and the type of operation, and recognizes the difference in the value of the privilege to operate each unit in a chain in Louisiana, depending upon whether the retail store is a unit in a small or a large chain of retail units.

All chains, under the Louisiana Statute, doing the same type of business and enjoying a privilege of the same value, are taxed and treated alike. In the *Indiana* case just cited the court said the fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction.

Liggett v. Lee.

Louis K. Liggett Company v. Lee, 288 U. S. 517, 53 S. Ct. 481, was the second important case decided by this Court involving chain store taxation.

The *Liggett* case involved the levy of a tax graduated according to the number of stores in a county, but provided that if the stores in the chain were located in more than one county, the rate for each store was increased.

The majority opinion of this Court in the *Liggett* case held that the fact the stores were located in more than

one county did not affect the "value of the privilege enjoyed" and, therefore, violated the Fourteenth Amendment to the Constitution of the United States. On this point, the Court said:

> "The appellees suggest that an owner reaps greater advantage by the establishment of a new store in a county not previously occupied. This may be conceded. It is evident, however, that the mere spatial relation between the store and a county line cannot, in and of itself, affect the value of the privilege enjoyed. The appellees fail to show how the fact that the new place of business lies in another county increases the advantage over that to accrue from a location within the same county. The classification is solely of different chains, and the difference between them consists neither in number, size, surrounding population, nor in any factor having a conceivable relation to the privilege enjoyed."

The Court's attention is directed to the fact that the basis of graduating the tax on chain stores, according to the number of units, in the *Indiana* and *Florida* cases, was the fact that all the units, taken as a system, affect the value of the privilege enjoyed in operating each unit. That is precisely the basis of the classification in the Louisiana Statute herein attacked.

In the *Liggett* case, this Court, in commenting on the ruling in the *Indiana* case, said:

> "It was there held that, whatever may be said of individual similarities and differences between chain store operation and the conduct of a single shop or a department store, the former employ distinguishable methods of conducting business, and the Legislature may make the difference in method and character of the business the basis of classification for taxation."

In further discussion the *Indiana* case, the Court, in the *Liggett* case, said:

> "The decision in the Jackson Case was based, not upon any single feature of chain store management, but upon the ultimate fact of common knowledge, illustrated and emphasized by the evidence, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store; and that the difference between an integrated and a voluntary chain is fundamental."

The Court, in the *Liggett* case, held that the fact that one group of stores fell into one classification, and another group into another classification, and that these stores were in competition with each other, is not sufficient ground to condemn a tax as discriminatory. In this connection, the Court said:

> "Neither similarity of opportunities and advantages in some aspects, nor the fact that the one kind of store competes with the other, is enough to condemn the discrimination in the taxes imposed."

The fact complainant competes with H. G. Hill Stores, therefore, is not enough to condemn the Louisiana Statute as alleged by complainant.

Further, the Court, in that same case, held that the difference between the classes need not be great, and that if any reasonable distinction can be found to sustain the classification and the statute, it should be held valid. The Court said:

> "It is needless to repeat what was said in the Jackson Case to the effect that the difference between

> the subjects taxed need not be great, and that, if any reasonable distinction can be found, the duty of the court is to sustain the classification embodied in the law."

Appellant, F. W. Woolworth Company, will file a brief contending that the decision in the *Liggett* case is decisive of the issues in the case at bar. This contention, we submit, is without merit.

The Florida Statute involved in the *Liggett* case provided for a graduated scale of taxes on all stores in a chain operated within a single county, but, if the same number of stores were located in more than one county, the license fee for each was materially increased. The Louisiana Statute has no such provision. It takes into account the additional advantages accruing to the operator of multiple retail stores that increase with the number of retail stores, and which can be easily calculated on a per store advantage, which advantage is enjoyed by each unit or retail store.

Under the Louisiana Statute, the rate per store in Louisiana is the same whether all the stores operated by a chain are located in one parish (county) or not. In other words, under the Florida Statute, if the corporation operated, say 10 stores in one county in that State and moved one of the 10 into another county, the rate on each store in both counties was increased by the mere moving of one of the 10 stores into another county. The chain would be then still operating 10 stores, and the only reason, under the Florida Statute, that the rate of tax was increased on each store was the fact that one of the 10 stores had been

moved across a county line. This classification, the majority of Court held in the *Liggett* case, was unreasonable and arbitrary.

Under the Louisiana Statute, if the same chain operates 10 stores in one parish (county) in Louisiana and should move one of the 10 stores into another parish (county), the rate of tax on each store, or unit, would be the same. It would be determined by the entire number of retail stores or units in the chain. Under the Louisiana Statute, the rate of tax per store is increased only by an increase in the number of retail stores under the same general supervision, management, ownership or control, the increase in the number of stores thereby increasing the multiple advantages of the chain operation, which increase in advantages is behind each store.

Under the Louisiana Statute, the increase in the rate of the tax on each store in Louisiana, where the number of stores in the chain is increased, is not an increase in the rate on each store in Louisiana because of the fact that retail stores are opened in other parishes (counties), or in other states; the Louisiana Statute merely determines the type of business done by each retail store in Louisiana, and the value of the privilege of each retail store in Louisiana to operate, by taking into account the many advantages accruing to each unit or retail store as the number of retail stores increase in the same chain. The evidence and testimony offered by appellees show, and as the lower court found, the greater the number of retail stores in a chain, the greater the multiple advantages enumerated in this brief, and the greater the per unit or per store advantage.

Fox v. Standard Oil Company of New Jersey.

The case of *Fox v. Standard Oil Company of New Jersey, 55 S. Ct. 333, 294 U. S. 87,* was the third chain store case of major importance.

The State of West Virginia levied a chain store tax. The rate of tax was determined by the number of units in the chain in the State. Filling stations were included within the definition of chain retail units. The filling stations attacked the validity of the statute on several grounds, including the fact that because they were small retailing units, and their sales were small compared with other types of retail units, that the tax was so oppressive as to amount to an arbitrary discrimination, or unlawful confiscation. The Court held otherwise and upheld the validity of the levy.

This Court, in discussing the power of the State of West Virginia to levy the tax involved, and to make the classification contained in said Statute, said:

> "When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers. The subject was fully considered in Magnano Co. v. Hamilton, 292 U. S. 40, 54 S. Ct. 599, 78, L. Ed. 1109, decided at the last term. 'Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk.' Alaska Fish Salting & By-Products Co. v. Smith, 255 U. S. 44, 48, 41 S. Ct. 219, 220, 65 L. Ed. 489, quoted in Magnano Co. v. Hamilton, supra, page 46 of 292 U. S., 54 St. Ct. 599."

This Court, in discussing the size of chains, and the effect of the increase in the number of units in the chain, said:

> "A chain, as we have seen, is a distinctive business species, with its own capacities and functions. Broadly speaking, its opportunities and powers become greater with the number of the component links; and, the greater they become, the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis, as indeed we have already held. State Board of Tax Commissioners v. Jackson, supra; Liggett Co. v. Lee, supra. Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry. Quong Wing v. Kirkendall, 233 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350; American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 95, 21 S. Ct. 43, 45 L. Ed. 102; Southwestern Oil Co. v. Texas, 217 U. S. 114, 126, 30 S. Ct. 496, 54 L. Ed. 688; Sproles v. Binford, 286 U. S. 374, 394, 52 S. Ct. 581, 76 L. Ed. 1167; Stephenson v. Binford, 287 U. S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A. L. R. 721. In principle there is no distinction between such an exercise of power and the statute upheld in Magnano Co. v. Hamilton, supra, whereby sales of butter were fostered and the sales of oleomargarine repressed. A motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of trade. Courts do not choose between such values in adjudging legislative powers. They put the choice aside as beyond their lawful competence. 'Collateral purposes of motives of a Legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry.' Mangano Co. v. Hamil-

ton, supra, at page 44 of 292 U. S., 54 S. Ct. 599, 601; McCray v. United States, 195 U. S. 27, 56, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561. The tax now assailed may have its roots in an erroneous conception of the ills of the body politic or of the efficacy of such a measure to bring about a cure. We have no thought in anything we have written to declare it expedient or even just, or for that matter to declare the contrary. We deal with power only."

In discussing the classification made by the West Virginia Statute, the Court said that the fact the taxpayer operated a great number of units which placed it in the classification in the upper brackets was brought about by its own expansion, and it was not the fault of the state that the taxpayer had seen fit to increase the number of retail units in its chain. In this connection, the Court said:

"The argument against the statute rings the changes upon a comparison between the position of the gasoline chains and that of chains for other products. The gasoline chains, as already noted in this opinion, have units more numerous by far than those that deal in other things, and because of their size must pay a large percentage of the tax, though it is not to be forgotten that there are general commodity chains also within the upper brackets. The outcome is no evidence of an arbitrary discrimination, defiant of the restraints of law. All members of a class within the same graduated levels are treated impartially and subjected to an equal rule. Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 293, 296, 18 S. Ct. 594, 42 L. Ed. 1037. If only one form of chain chooses so to multiply its units, after arriving at the topmost levels, as to make the burden heavy, it owes its position on the scale and the aggravation of the tax to the exigencies of business and not to those of law. The classification is

not arbitrary, but in its normal operation has a rational relation to the subject-matter to be taxed, the capacity to pay, and the justice of the payment. Cf. Magoun v. Illinois Trust & Savings Bank, supra; Knowlton v. Moore, 178 U. S. 41, 54, 20 S. Ct. 747, 44 L. Ed. 969; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369; Ann. Cas. 1912C, 160; Lake Shore & Michigan Southern R. Co. v. Clough, 242 U. S. 375, 385, 37 S. Ct. 144, 61 L. Ed. 374; Maxwell v. Bugbee, 250 U. S. 525, 540, 541, 40 S. Ct. 2, 63 L. Ed. 1124; Watson v. State Comptroller, 254 U. S. 122, 124, 41 S. Ct. 43, 65 L. Ed. 170; State Board of Tax Commissioners v. Jackson, supra, at page 537 of 283 U. S., 51 S. Ct. 540."

This Court further said that in levying taxes, the Legislature is not required to determine whether or not the placing of taxpayers in certain brackets would mean the difference betwen a profit and a loss, and that the governing body does not have to inquire to see if the taxpayer can pay the tax without sacrifice of profits. The language of the Court follows:

"We have never yet held that government in levying a graduated tax upon all the members of a class must satisfy itself by inquiry that every group within the class will be able to pay the tax without the sacrifice of profits. The operation of a general rule will seldom be the same for every one. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict."

Appellants argue the statute involved is especially arbitrary because it does not take into account the remoteness of the units in a chain and the differences in value of different units. It has never been required that

the legislature in classifying must do so with such mathematical precision that the effect of the law will be felt equally by all whom it affects. See *Magoun v. Illinois Trust & Sav. Bank, 197 U. S. 283, 293, 296, 42 L. ed. 1037, 1042, 1043, 18 S. Ct. 594.*

Appellants argue that the Louisiana statute does not represent any policy to protect, was not designed to, and does not in fact, protect independent merchants against chains, but establishes an arbitrary discrimination against chains operating in other states.

This conclusion is not well founded for the act classifies chain stores in accordance with the economic advantages which they possess and gives recognition to the basic differences of their operations. The act itself in Section #1 specifically recites this. The Louisiana Legislature obviously had the right to make the classification in the fashion set forth in the act.

This Court, in the case of *Veazie Bank v. Fenno, 8 Wall. 533, 548, 19 L. ed. 482,* held that the Courts are without authority to prescribe limitations upon the exercise of acknowledged powers of the legislative departments. The power to tax may be exercised oppressively upon persons. The responsibility of the legislature is not to the courts but to the people by whom its members are elected. In other words, the legislature is the sole arbiter of the Destinies of its people within constitutional limits. Moreover, it has been repeatedly held:

> "Even if the tax should destroy a business, it would not be made invalid or require compensation upon

that ground alone. Those who enter upon a business take that risk." *Alaska Fish Salting & By Products Co. v. Smith, 255 U. S. 44, 48, 65 L. ed. 489, 495, 41 S. Ct. 219.*

Appellants further argue that a corporation may actually decrease its operations in Louisiana and yet be required to pay increased taxes to Louisiana because of what it does outside Louisiana. As a matter of fact, no injustice is done in the case of where a corporation decreases its operations in Louisiana and yet may be required to pay increased taxes in Louisiana because of what it does outside of Louisiana, this for the reason that the Louisiana units, being integral parts of the national chain, are commensurately benefited by the addition of more units to the chain.

No one questions the constitutional right of the State of Louisiana to tax the privilege of operating retail units in multiple form in Louisiana.

Act 51 of 1934 taxes a thing that the State of Louisiana has a right to tax. The levy, therefore, is valid. The authorities herein cited, when considered in connection with the testimony, documentary evidence and offerings of appellees, clearly show the Legislature of Louisiana has properly and validly classified the business of operating chains within the borders of the State of Louisiana.

The next point urged by appellants is the method used by the Legislature of Louisiana in arriving at the rate of the tax per unit in Louisiana. In this connection, the following authorities are submitted which show the

rate used by the Legislature in Act 51 of 1934 is constitutional, and in no way is violative of the provisions of either the Constitution of the United States or the Constitution of Louisiana.

POINT III.

Under Act 51 of 1934 rate of tax alone affected by total retail stores in chain; Maxwell v. Bugbee, 40 S. Ct. 2, 250 U. S. 525.

This Louisiana Statute levies a license or privilege tax for the privilege of doing business in Louisiana. The measure is the number of stores in Louisiana. Only the rate is determined by the number of stores in the entire chain. No property outside of Louisiana is taxed under the Statute. The rate only is affected by units of the chain outside of Louisiana, and these units are considered only for the purpose of determining the type of business done in Louisiana, and the value of the privilege of operating each unit in Louisiana.

Maxwell v. Bugbee.

The case of *Maxwell v. Bugbee, 40 S. Ct. 2, 250 U. S. 525*, involved a New Jersey inheritance tax law which levied a tax upon the transfer of property in New Jersey, to be paid upon turning said property over to an administrator or executor at the domicile of the decedent.

This New Jersey statute was attacked as being violative of the Constitution of the United States on the ground that it, in effect, taxed property beyond the jurisdiction of the State of New Jersey.

The following quotation taken from the case of *Maxwell v. Bugbee, supra*, shows the nature of the tax, the method of arriving at the amount due by the estate involved in the *Bugbee* case, and its relevancy to the case at bar:

> "Before taking up these objections it is necessary to briefly consider the nature of the tax. In Carr v. Edwards, 84 N. J. Law, 667, 87 Atl. 132, it was held by the New Jersey Court of Errors and Appeals to be a tax upon the special right, the creation of the statute, of an executor or administrator of a nonresident decedent to succeed to property having its situs in New Jersey. Of Section 12, as it stood in the original act of 1909, the court said:
>
> > " 'That section contains nothing to indicate that it is not the succession of the New Jersey representative that is meant to be taxed. It is true that the tax is not necessarily 5 per cent. upon the whole New Jersey succession. The amount depends on the ratio of the New Jersey property to the entire estate wherever situated. This, however, merely affords a measure of the tax imposed; the tax is still by the very words of the section imposed upon the property located within this state. * * *."
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> * * * * * *
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> "(2) It is next contended that the effect of including the property beyond the jurisdiction of the state in measuring the tax amounts to a deprivation of property without due process of law because it in effect taxes property beyond the jurisdiction of the state.
>
> "It is not to be disputed that, consistently with the federal Constitution, a state may not tax property beyond its territorial jurisdiction; but the subject-matter here regulated is a privilege to succeed to property which is within the jurisdiction of the state. When the state levies taxes within its

authority, property not in itself taxable by the state may be used as a measure of the tax imposed. This principle has been frequently declared by decisions of this court. The previous cases were reviewed and the doctrine applied in Kansas City R. R. Co. v. Kansas, 240 U. S. 227, 232, 36 Sup. Ct. 261, 60 L. Ed. 617. After deciding that the privilege tax, there involved, did not impose a burden upon interstate commerce, this court held that it was not in substance and effect a tax upon property beyond the state's jurisdiction, although a large amount of the property which was referred to as a measure of the assessment, was situated outside of the state. In the present case the state imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so, within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly established. The transfer of certain property within the state is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. It is only in instances where the state exceeds its authority in imposing a tax upon a subject-matter within its jurisdiction in such a way as to really amount to taxing that which is beyond its authority, that such exercise of power by the state is held void. In cases of that character the attempted taxation must fail. Looney v. Attorney General, 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. 230; International Paper Co. v. Massachusetts, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. Ed. 624, Ann. Cas. 1918C, 617. To say that to apply a different rule regulating succession to resident and non-resident decedents is to levy a tax upon foreign estates, is to distort the statute from its purpose to tax the

privilege, which the statute has created, into a property tax, and is unwarranted by any purpose or effect of the enactment, as we view it."

Application of New Jersey Statute.

In the *Bugbee* case, the decedent was a nonresident of New Jersey, leaving property both in New Jersey and in other states. He left property running into millions of dollars, but for the purpose of illustration, the following calculation shows the method of arriving at the amount of the tax due under said New Jersey statute, and its application to the case at bar. The Court in the *Bugbee* case, said:

"Following the statute, the tax was first ascertained on the entire estate as if it was the estate of a resident of the State of New Jersey with all of the decedent's property, both real and personal, located there; the tax was apportioned and assessed in the proportion that the taxable New Jersey estate bore to the entire estate."

Assume, for the purpose of argument, that Louisiana has a statute similar to New Jersey statute involved in the *Bugbee* case, and that the Louisiana statute provided that the same method named in the New Jersey statute should be used in determining the amount of tax due the State of Louisiana, that is, if the estate is less than $1,000.00, the tax should be 1%; if the estate is less than $5,000.00 and more than $1,000.00, the rate of tax is 2%, and if the estate is over $5,000.00, the rate is 3%.

Assume, then, that a nonresident of Louisiana dies leaving $1,000.00 worth of property in Louisiana and $9,000.00 worth of property outside of Louisiana, making the total estate worth $10,000.00.

Under the New Jersey statute, the property in Louisiana and the property outside of Louisiana would be added to make a total estate of $10,000.00. This places the estate in the bracket for which a 3% tax is provided, whereas if only the property in Louisiana was considered, the rate would be 1%.

Three per cent of the $10,000.00 would, of course, amount to $300.00, which is the amount of tax based on the whole estate, including property within and property without Louisiana. The amount of tax due Louisiana would be the proportion that the taxable Louisiana estate bears to the entire estate which, of course, would be 10% of the entire estate.

Then taking 10% of the $300.00, the amount of tax due on the property in Louisiana is $30.00. Whereas, if only the Louisiana property was considered, the rate would be 1%, and the tax $10.00.

Obviously, therefore, the only thing the property outside of New Jersey in the *Bugbee* case, and the property outside of Louisiana in the hypothetical case, did to the tax was to affect the rate and, therefore, increase the tax.

Frick v. Pennsylvania.

Following the *Bugbee* decision, the case of *Frick v. Commonwealth of Pennsylvania, 268 U. S. 473, 45 S. Ct. 603*, was decided by this Court.

The *Frick* case, *supra*, involved a tax on the estate of a resident of Pennsylvania who died leaving a large

amount of property. Besides real and personal property in Pennsylvania, the estate included tangible personal property having a situs in Massachusetts.

The Pennsylvania statute involved in the *Frick* case, *supra*, provided that where a person domiciled in that state died seized or possessed of property, real or personal, a tax shall be laid on the transfer of the property from him by will or intestacy laws, whether the property be in that state or elsewhere.

The method of arriving at the amount of tax due under the Pennsylvania statute was by adding the value of all the property left by decedent, whether it be within or without the state, and taking a percentage of same. The property outside the state did not affect the rate, as it did in the *Bugbee* case, but was treated as if it was within the State of Pennsylvania. The value of that property without the state was simply added to the value of the property within the State of Pennsylvania, and the tax arrived at by a set percentage of the entire value.

This Court held that by including the value of the property outside of Pennsylvania, which had acquired a situs outside of the State, was, in effect, taxing property without the jurisdiction of the State of Pennsylvania.

The Court in discussing the case of *Maxwell v. Bugbee, supra*, which was urged in the defense of the Pennsylvania statute, said that the New Jersey Statute and the

Pennsylvania Statute were different; that in the *New Jersey* case, that the only thing the property outside of New Jersey did was to affect the rate of the tax. In discussing the *Bugbee* case in this connection, the Court said:

> "The state court cited in support of its view Maxwell v. Bugbee, 250 U. S. 525, 539, 40 S. Ct. 2, 63 L. Ed. 1124. The case is on the border line, as is evidenced by the dissent of four members of the court. But it does not go so far as its citation by the state court suggests. The tax there in question was one imposed by New Jersey on the transfer of stock in a corporation of that state. The stock was part of the estate of a decedent who had resided elsewhere. The state statute, described according to its essence, provided for a tax graduated in rate according to the value of the entire estate, and required that where the estate was partly within and partly without the state the transfer of the part within should bear a proportionate part of what according to the graduated rate would be the tax on the whole. The only bearing which the property without the state had on the tax imposed in respect of the property within was that it affected the rate of the tax. Thus, if the entire estate had a value which put it within the class for which the rate was three per cent. that rate was to be applied to the value of the property within the state in computing the tax on its transfer, although its value separately taken would put it within the class for which the rate was 2 per cent. There was no attempt, as here, to compute the tax in respect of the part within the state on the value of the whole."

Maxwell v. Bugbee Not Overruled.

Appellants, in the lower Court, took the position, and will probably urge to this Court, that the case of *Maxwell v. Bugbee, supra*, was overruled by this Court when it

overruled the case of *Blackstone v. Miller, 188 U. S. 189*, upon which authority, counsel argued, the ruling in the *Bugbee* case rested. Counsel is in error in this respect for the reason that that part of the opinion in the *Bugbee* case involving the rate of the tax, was based on the case of *Kansas City R. R. Co. v. Kansas, 240 U. S. 227, 232, 36 S. Ct. 261, 60 L. Ed. 617*, and was not based on the case of *Blackstone v. Miller, supra*, as indicated by counsel.

It is true that in the case of *Farmers' Loan & Trust Company v. Minnesota, 280 U. S. 204*, this Court definitely overruled *Blackstone v. Miller, supra.* The case of *Blackstone v. Miller*, however, did not involve the question in the *Bugbee* case, which is pertinent to the issues in the case at bar. The point overruled in the *Bugbee* case by the overruling of *Blackstone v. Miller*, was the question involving the privilege which was subject to the tax, and not the method of arriving at the rate.

A careful reading of these decisions conclusively shows that *Maxwell v. Bugbee, supra*, insofar as that portion of the decision that is pertinent here, which was based on the case of *Kansas City R. R. Co. v. Kansas, supra*, is still in force and effect and is still the law. The writer is supported in this view by the author of an article in the Yale Law Journal, Volume XLIV, No. 4, February 1935, page 634, and by the author of an article in the Harvard Law Review, Volume XLIX, No. 5, March, 1936, page 756. Both these articles are based on the Louisiana Statute herein attacked.

POINT IV.

Retail stores operated by appellants in Louisiana are part of a system; State can look beyond borders to determine true value of properties within the State when all are part of a system.

The retail units operated in Louisiana by appellants are part of a chain or system; the units outside of Louisiana forming part of the system or chain contribute to the value of the privilege of doing business in Louisiana, and determine the type of business done in Louisiana. There is a per store advantage behind each unit in Louisiana, created by the entire chain.

Each unit contributes to the central purchasing power and increases the per unit multiple advantages enjoyed by the operator of the system. The greater the number of units in the chain, the greater the ramifications, the greater the purchasing power, the greater the secret rebates and allowances, the greater the advantages in advertising, the lower the cost of distribution, the lower the cost of overhead, the greater the capital employed, the greater the effect socially and economically speaking, and the greater the many other advantages accruing to chain operations, as shown by the testimony and evidence in the case at bar.

Each unit in a chain operated in a large area, including many states, contributes to the advantages enumerated above, and these advantages are enjoyed by each unit, and the total number of units define the type of business done by each unit and increases the value of the privilege of doing that type of business in the State.

It is settled jurisprudence that a state can look beyond its borders for the purpose of assessing tangible property within its confines for the purpose of getting the true value of the properties within its borders when that thing or property is a part of a system or organization of wide extent, and when the property outside adds to the value of the property within the state.

Act 51 of 1934, however, does not look to the value of any property outside the State of Louisiana, but merely includes in the method of arriving at the rate of tax due on each unit in Louisiana, the number of units in the chain, some of them possibly outside the state.

This Court, in the case of *Wallace, et al., v. Hines, 253 U. S. 66, 40 S. Ct. 435*, in discussing the method of taxing railroads that pass through several states, said:

> "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess."

Volume 61 of Corpus Juris, page 694, in discussing this same subject, states:

> "Where a particular property is part of the railroad system, and has its actual use only a connection with such system, that fact may be considered even though other parts of the system are outside of the state; Southern Railway Company vs. Commonwealth of Kentucky, 47 S. Ct. 542, 274 U. S. 76, 71 L. Ed. 934."

This Court, in the case of *Union Tank Line v. Wright, 39 S. Ct. 276*, said:

> "Nor is the state obliged to ignore the special value that rolling stock has because of its organic relation to, and its customary use in connection with, the railroad tracks upon which it runs. Although the equipment be held in separate ownership, it may be regarded in fact as an appurtenance of the railroad and valued in that relation. It is admitted that the revenue derived by plaintiff in error from the use of its cars is in part paid by the railroad companies and proportioned to the mileage covered by the run of the cars."

In that same case, the Court further said:

> "While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well 'the intangible value due to what we have called the organic relation of the property in the state to the whole system.' How to appraise them fairly when the tangibles constitute part of a going concern operating in many states often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement producing results approximately correct—for example, the mileage basis in case of telegraph company (W. U. Tel. Co. v. Massachusetts) and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit Co. v. Hall)."

In the case of *Western Union Telegraph Company v. Taggart, 16 Supreme Court, 1054*, the Court said:

> " 'It is not to be assumed that a state contemplates the taxation of any property outside its territorial limits, or that its statues are intended to operate otherwise than upon persons and property within

the state. It is not necessary that every section of a tax act should in terms declare the scope of its territorial operation. Before any statute will be held to intend to reach outside property, the language expressing such intention must be clear. 154 U. S. 428, 14 Sup. Ct. 1114.' "

" 'Nevertheless, it is ordinarily true that when a railroad consists of a single, continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair." 154 U. S. 430, 431, 14 Sup. Ct. 1114.

"In support of the last statement were cited State Railroad Tax Cases, 92 U. S. 608 611; Delaware Railroad Tax Case, 18 Wall. 206; Erie Railway v. Pennsylvania, 21 Wall. 492; W. U. Tel. Co. v. Attorney General of Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961; Pullman's Palace-Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876; Maine v. Grand Trunk Railway Co., 142 U. S. 217, 12 Sup. Ct. 121, 163; Railroad Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255; Railway Co. v. Wright, 151 U. S. 470, 14 Sup. Ct. 396.' "

" 'Take the case of a railroad running from Columbus, Ohio, to Indianapolis, Indiana. Whatever of value there may be resulting from the continuous operation of that road is partly attributable to the portion of the road in Indiana, and partly to that in Ohio; and each state has an equal right to reach after a just proportion of that value, and subject it to its taxing processes. The question is, how can equity be secured between the states? and to that a division of the value of the entire property upon the mileage basis is the legitimate answer. Taking a mileage share of that in Indiana is not taxing prop-

erty outside of the state. 154 U. S. 444, 445, 14 Sup. Ct. 1114.'"

In the case of *Fargo v. Hart, 24 S. Ct. 498*, the Court said:

"The general principles to be applied are settled. A state cannot tax the privilege of carrying on commerce among the states. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the states. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even though the other parts of the system are outside of the state."

Franchise Tax on Domestic Corporations, Measured by Its Entire Property Even Though Some Located Outside the State, Valid.

In the case of *Educational Films Corporation v. Ward, 51 S. Ct. 172*, in sustaining a franchise tax on domestic corporations, measured by the entire income, whether the income be within or without the State, the Court said:

"A state may not tax tangible property located beyond its boundaries, Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; but it may measure a tax on franchises of domestic corporations by corporate property, even though without the State. Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227, 36 S. Ct. 261, 60 L. Ed. 617; Cream of Wheat Co. v. Grand Forks County, 253 U. S. 325, 40 S. Ct. 558, 64 L. Ed. 931. So well settled is this last-mentioned application of the doctrine that an excise

may be measured by tax immune property, that an appeal in which such a tax was assailed on the very ground urged here, was dismissed per curiam during the present term. No. 108, Nebraska ex rel. Beatrice Creamery Co. v. Marsh, 282 U. S. 799, 51 S. Ct. 38."

In the case of *Flint v. Stone Tracy Company, 31 S. Ct. 354*, this Court said:

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part, at least, property which, as such, could not be directly taxed. See, in this connection, Main v. Grand Trunk R. Co., 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163, as interpreted in Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217, 226, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638."

This Court, in the case of *Baltic Mining Co. v. Mass., 58 L. Ed. 127*, said that if a tax is levied on a legitimate subject of taxation, the fact it is measured by property or receipts from property not in themselves taxable does not invalidate the levy. The language of the Court follows:

"The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself

lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the State. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. Insofar as it is represented in the authorized capital stock, it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

Certainly the Louisiana statute in question is levied on a legitimate subject of taxation—the privilege of doing business in Louisiana. Even the measure of the tax under the statute is the number of units in the chain in Louisiana. This makes it a much stronger case than the facts in the *Baltic Mining Company* decision. It is only the rate that is affected by all the units in the chain. See also the case of *Kansas City F. S. & M. R. Co. v. Botkin, 60 L. Ed. 617, 36 S. Ct. 261, 240 U. S. 227*, where the Court said:

"The Court held that the tax in question was simply a tax on the privilege of being a corporation—that the authority of the state to tax this privilege, or franchise, has always been recognized, and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the state's taxing power."

Similarly, this Court has upheld income taxes levied on citizens of the State, measured by the entire income of the citizen, irrespective of where it was earned. See *Lawrence, et al., v. State Tax Commission of State of Mississippi, 52 S. Ct. 556, 286 U. S. 276.*

POINT V.

Louisiana Statute should be sustained on further ground that all appellants are foreign corporations doing intrastate business in Louisiana.

The appellants in the case at bar are foreign corporations doing intrastate business in Louisiana. This suit is brought by the appellants as a class suit, for the benefit of all corporations similarly situated.

The appellants can succeed only if the discrimination is unconstitutional as applied to them; that is, as applied to corporations. One who would strike down a statute must show that he is not only affected by it, but that as applied to him it exceeds the power of the State. *Albany County v. Stanley, 105 U. S. 305, 314, 26 L. Ed. 1044.*

The Federal Constitution does not confer upon either domestic or foreign corporations the right to engage in intrastate commerce in Louisiana. The privilege of engaging in such commerce in corporate form is one which the state may confer or withhold as it sees fit. *Railway Express Agency v. Virginia, 282 U. S. 440, 51 S. Ct. 201, 75 L. Ed. 450.* Louisiana has the right to extend the privilege to one set of persons and deny it to others. The state has the right to grant it to some type of businesses and deny it to others; it might grant the privilege to corporations with small capital, while denying it to those whose capital and resources are large. Whether the corporate privilege should be granted or withheld is a matter of state policy and rests with the Legislature.

If the Louisiana statute herein attacked had stated in terms that the excise license or privilege tax was exacted as compensation for the privilege of conducting multiple stores in corporate form in Louisiana, no corporation could successfully challenge its validity. *Horn Silver Mining Co. v. N. Y., 143 U. S. 305, 12 S. Ct. 403, 36 L. Ed. 164; Kansas City Ft. S. M. R. Co. v. Botkin, 240 U. S. 227, 36 St. Ct. 261.* And since the state had the power to do so, the mere failure to state that such was the nature of the license tax does not render it invalid. *Costillo v. McConnico, 168 U. S. 674, 683, 18 S. Ct. 229, 42 L. Ed. 622.*

If Louisiana believes that adequate protection against harm apprehended or experienced can be secured without revoking the corporate privilege, by imposing upon corporations the handicap of higher, discriminatory license fees as compensation for the privilege, there is nothing in the 14th Amendment to prevent it from so doing.

A thorough discussion of this additional ground and reason why the Louisiana Statute should be sustained will be found in the dissenting opinion of Justice Brandeis in the case of *Liggett Co. v. Lee, 288 U. S. 517, 53 S. Ct. 481.* It is evident that this point was not urged in the *Liggett* case, which involved the Florida Chain Store Tax Statute, either in oral argument or in brief. Justice Stone and Justice Cardozo so stated, and reserved the right to pass on this point when properly presented to the Court. It is, with respect, here urged.

In line with the reasoning of Justice Brandeis, as found in his opinion referred to, there is given below a

statement showing the appellants in the case at bar, together with the number of stores operated by them. Seven of the seventeen appellants in this suit are listed among the 200 largest non-banking corporations in the United States, referred to by Justice Brandeis. (See *"Modern Corporations and Private Property"* by Berle & Means, Page 19.) The assets of each of these seven corporations are also given in the following statement:

No. of Stores		Assets
14,705	The Great Atlantic & Pacific Tea Company	$147,335,000
436	Sears, Roebuck & Company	251,800,000
232	Wohl Shoe Company	
217	Consolidated Millinery Company	
465	W. T. Grant Company	
135	Scott-Burr Stores	
1,474	J. C. Penney Company	
2,634	F. W. Woolworth Company	165,400,000
352	J. J. Newberry Company	
131	H. L. Green Company	
452	Liggett Drug Company, Incorporated	
491	Montgomery, Ward & Company	187,500,000
330	G. R. Kinney Company, Incorporated	
570	Firestone Tire & Rubber Company	161,600,000
348	Goodyear Tire & Rubber Company	243,200,000
572	Melville Shoe Corporation	
*	General Electric Company	515,700,000
Total 23,544		Total $1,672,535,000

*Total number of retail not shown in the record.

POINT VI.

In the alternative, Louisiana Statute, in effect, classifies chain operators in Louisiana as local, sectional and national chains.

The position of the State in the foregoing part of this brief is here re-urged but, in the event the Court should not agree with the position of the State, and the authorities cited in support of its contention, then in the alternative, and in the alternative only, we submit that the Louisiana Statute, in effect, classifies chains operating in Louisiana into local, sectional and national chains. There is no question but what the Legislature of Louisiana has the right to make this classification for the purpose of taxation.

Justice Cardozo, at *page 502*, in the case of *Louis K. Liggett v. Lee, supra*, said:

> "Students of the chains have accepted the classification of the Census Bureau, which divides them into three groups: Local, sectional, and national. Census of 1930, Report on Retail Distribution by Chains; Lebhar, 'The Chain Store,' p. 20. Chains are local 'if substantially all their stores are located in and around some one city.' In 1930, the number of these was 5,589. They are sectional if their 'stores are located in some one section of the country, such as the New England states or the Pacific Coast states or in the Gulf Southwest or any other geographic division.' Of these there were 1,136. They are national if their 'interests are broader than those of any one section of the country.' Of these there were 321.
>
> "Statistics thus indicate that there is a definite line of cleavage between chains that serve customers

> within a single territorial unit and those framed for larger ends. The business that keeps at home affects the social organism in ways that differ widely from those typical of a business that goes out into the world. It affects the social organism, but also it affects itself. With the lengthening of the chain there are new fields to be exploited. The door is opened to opportunities that have hereto been closed."

Justice Roberts, in the case of *Louis K. Liggett v. Lee, supra*, in discussing the Florida Statute involved in that case, clearly indicated that if the Florida Statute had drawn a distinction between national and local chains, the classification would have been valid. In that opinion, he said:

> "It cannot justifiably be said that the section draws a distinction between national and local chains. The operation of the statute forbids any such assumption; for, if a national chain keeps multiple units within a single county, the tax on each is at the lower rate, while, if a so-called local chain has one store in a given county and another just over the county line, both places of business take the higher rate. This difference in treatment has no discernible relation to the sort of chain which establishes a store across a county line. The act is not a rough and ready but honest effort to differentiate what the Federal Census Bureau for its purpose denominates local chains on the one hand and what the Bureau terms sectional or national chains on the other. Neither the phraseology nor the method of operation of the act is consistent with an attempt at any such classification."

For this further reason, the Louisiana Statute should be sustained.

POINT VII.

Rate of tax fixed by number of retail units applies only to chain stores.

Counsel for appellants argued in the lower court that if the Louisiana Statute is held not to violate the Louisiana and Federal Constitutions, different types of taxes, named in the brief and in oral argument, could be levied affecting other businesses. This assumption is entirely beside the point because this Court has already held that there is sufficient difference in the methods of operation used by chains to justify classification according to the number of stores. Whether this same classification would be held valid for other types of business, in the writer's opinion, is immaterial insofar as the present case is concerned.

Chains Continue to Expand in Louisiana.

Appellants argue that wealth in Louisiana is less than in some areas where chains operate and that, therefore, the Louisiana units do not contribute as much to the system of units as a whole as do some of the other units. This may be true, but the chains continue to expand in Louisiana. They evidently are satisfied with returns in Louisiana. The Great Atlantic & Pacific Tea Company increased its number of units in Louisiana during its last fiscal year a fraction more than nine per cent.

The chain operators in Louisiana should be satisfied with their operations in Louisiana. According to the Fifteenth Census of the United States, Document No.

R-129, issued by the Bureau of the Census, page 6, there are 940 retail stores in Shreveport; 697 of them are owned by single store independents, and 239 are operated by chains. In other words, 25% of the stores in Shreveport are chain stores. The chains do 33.4% of the business done in Shreveport. (1930).

In Baton Rouge 22% of the retail stores are operated by chains, and they do 35.8% of the business.

POINT VIII.

Robinson-Patman Act.

The writer has not had an opportunity to examine the principal brief to be filed in this Court by appellants. It is necessary, therefore, to anticipate, to some extent, the argument to be urged by appellants.

In the event appellants urge that the Robinson-Patman Act of June 19, 1936, Public 692, Amending Section 2 of the Clayton Act *(U. S. C. Title 15, Section 13)*, and in that event only, appellees show that said Act has no bearing whatever on the case at bar, except to show that the method of arriving at the rate of tax contained in the Louisiana Statute is reasonable and valid, and that the classification of the business done by the operators of a store or stores in Louisiana that constitute part of a chain or system is justifiable and reasonable.

In the first place, the Robinson-Patman Act did not become a law until June 19, 1936, which was long after the passage of the Louisiana Statute, and became a law after the suit at bar was tried and submitted in the lower

court. The appellants may not now change the theory of their case in this Court. *Virginia R. Co. v. Mullins, 271 U. S. 220, 70 L. ed. 915, Virtue v. Creamery Package Mfg. Co., 227 U. S. 8, 57 L. ed. 393, Thomas v. Taylor, 224 U. S. 73, 56 L. ed. 673.*

The application of appellants for an injunction in the case at bar must be viewed in the light of circumstances existing when it was brought. *First National Bank v. Flershen, 78 L. ed. 465, Busch v. Jones, 46 L. ed. 707.*

A reading of the Robinson-Patman Act will disclose that this Act does not eliminate the advantages possessed by large chains, which advantages are behind each unit in the chain. In the first place, the Robinson-Patman Act only applies to persons engaged in commerce between the states. Furthermore, the law does not strike with illegality quantity discounts but refers merely to discriminatory discounts. That Law specifically provides that:

> "nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

POINT IX.

The opinion of the district court of three judges should be affirmed.

The personnel of the three judge district court hearing this cause was Hon. Rufus E. Foster, Judge of the United States Circuit Court of Appeals, Fifth Circuit, Hon. Joseph C. Hutcheson, Jr., Judge of the United States

Circuit Court of Appeals, Fifth Circuit, and Hon. Wayne G. Borah, Judge of the United States District Court for the Eastern District of Louisiana. With two judges of the United States Circuit Court of Appeals participating in this case, the decision is equivalent to one rendered by the United States District Court for the Eastern District of Louisiana, and affirmed by the United States Circuit Court of Appeals, Fifth Circuit.

In view of the evidence and testimony in this case offered by appellees, and for the reasons set forth in this brief, we, with respect, submit Act 51 of 1934 is violative of neither the Constitution of the United States nor the Constitution of the State of Louisiana, and that it should be so decreed; that the opinion of the district court of three judges should be affirmed.

Respectfully submitted,

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J. C. DASPIT,
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STATE OF LOUISIANA

THE CHAIN STORE LAW

ACT No. 19 OF 1932 AS AMENDED
BY ACT No. 51 OF 1934

Issued by
SUPERVISOR OF PUBLIC ACCOUNTS
Baton Rouge, La.

ACT No. 19 OF 1932 AS AMENDED BY ACT No. 51 OF 1934.

House Bill No. 137. By Messrs. Wimberly, Madison, Bradford and Calhoun.

AN ACT

An Act to levy an annual license tax on all persons, firms, partnerships, corporations or associations of persons engaged in the business of operating two or more stores or mercantile establishments, one or more of which is located in this State, where goods, wares, merchandise, or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores, under Section 8 of Article X of the Constitution of 1921; and providing penalties for the violation of this Act; and making an appropriation and distribution of said funds. Title amended.

Section 1. Be it enacted by the Legislature of Louisiana, That because of the advantages accruing from the operation of multiple stores wherever situated, and because of the basic difference inherent in such character of operations, there be and is hereby levied an annual license tax for the year 1935 and for each subsequent year upon each person, firm, partnership, corporation or association of persons engaged in the business of operating, or maintaining, as part of a group or chain, any store or stores in this State, where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores. Levying annual license tax on chain stores.

Sworn reports to be filed with Supervisor of Public Accounts.

Section 2. That every person, firm, partnership, corporation or association of persons engaged in the business described in Section 1 of this Act and doing business in this State shall, on or before the first day of February of each year, render to the Supervisor of Public Accounts a report signed and sworn to by the person or persons in interest, his or their duly authorized agent or officer, containing a true and complete statement showing the number of stores or mercantile establishments operated or maintained in this State in the preceding year; the name, location and street address of each such store or mercantile establishment; and such other information as the said Supervisor of Public Accounts may require.

Graded license tax.

Section 3. That the license tax for said business described in this Act levied upon the store or stores operated in the State of Louisiana shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or control, whether operated in this State or not, and shall be fixed and graded as follows, to-wit:

(1) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of not more than ten stores, the annual license shall be Ten ($10.00) Dollars for each such store operated in this State.

(2) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than ten stores, but not more than thirty-five stores, the annual license shall be Fifteen ($15.00) Dollars for each such store operated in this State.

(3) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than thirty-five stores but not more than fifty stores, the annual license shall be Twenty ($20.00) Dollars for each such store operated in this State.

(4) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than fifty stores but not more than seventy-five stores, the annual license shall be Twenty-five ($25.00) Dollars for each such store operated in this State.

(5) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than seventy-five stores but not more than one hundred stores, the annual license shall be Thirty ($30.00) Dollars for each such store operated in this State.

(6) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than one hundred stores but not more than one hundred twenty-five stores, the annual license shall be Fifty ($50.00) Dollars for each such store operated in this State.

(7) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than one hundred twenty-five stores but not more than one hundred fifty stores, the annual license shall be One Hundred ($100.00) Dollars for each such store operated in this State.

(8) Upon stores or mercantile establishments operated in this State and belonging to

a chain or group having a total of more than one hundred fifty stores but not more than one hundred seventy-five stores, the annual license shall b One Hundred Fifty ($150.00) Dollars for each such store operated in this State.

(9) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than one hundred seventy-five stores but not more than two hundred stores, the annual license shall be Two Hundred ($200.00) Dollars for each such store operated in this State.

(10) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than two hundred stores, but not more than two hundred twenty-five stores, the annual license shall be Two Hundred Fifty ($250.00) Dollars for each such store operated in this State.

(11) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than two hundred twenty-five stores but not more than two hundred fifty stores, the annual license shall be Three Hundred ($300.00) Dollars for each such store operated in this State.

(12) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than two hundred fifty stores but not more than two hundred seventy-five stores, the annual license shall be Three Hundred Fifty ($350.00) Dollars for each such store operated in this State.

(13) Upon stores or mercantile establishments operated in this State and belonging to

a chain or group having a total of more than two hundred seventy-five stores but not more than three hundred stores, the annual license shall be Four Hundred ($400.00) Dollars for each such store operated in this State.

(14) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than three hundred stores but not more than four hundred stores, the annual license shall be Four Hundred Fifty ($450.00) Dollars for each such store operated in this State.

(15) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than four hundred stores but not more than five hundred stores, the annual license shall be Five Hundred ($500.00) Dollars for each such store operated in this State.

(16) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than five hundred stores, the annual license shall be Five Hundred Fifty ($550.00) Dollars for each such store operated in this State.

License in addition to all other taxes.

Section 4. The license herein prescribed shall be in addition to ad valorem taxes and licenses prescribed in the general license laws of this State.

License taxes payable before March 1st to Supervisor of Public Accounts.

Section 5. That the license taxes under this Act shall be payable before the first day of March of each year to the Supervisor of Public Accounts for the State of Louisiana, who is hereby charged with the duty of collecting the said taxes, and if delinquent, such taxes shall bear interest at the rate of two per cent per month, plus ten per cent additional on both

principal and interest as attorney's fees in all cases wherein an attorney is called on to assist in the collection. A separate license shall be issued for each store operated or maintained by licensee, and it shall be the duty of licensee to post the license in a conspicuous place in each store.

Separate licenses.

Employment of private counsel.

That the Supervisor of Public Accounts, in order to enforce the collection of the aforesaid taxes is hereby authorized to employ private counsel to represent him in any proceeding under this Act.

Amounts collected to be prorated to various parishes.

Section 6. All taxes collected under the provisions of this Act shall be paid to the Supervisor of Public Accounts, and he shall distribute and apportion and pay such amounts so received by him in any fiscal year to the various parishes of the State of Louisiana wherein said stores are located, based pro rata upon the population of each parish as found and shown by the last United States census of the said State of Louisiana, and the said Parishes shall use the apportioned fund as follows, to-wit: first, for the liquidation of any outstanding road or school bonds, or other bonded indebtedness of said parish, which bonded indebtedness is paid by a tax levied on property; second, where there is no bonded indebtedness, as above stated, the aforesaid pro rated funds shall be applied to and used for the public schools of said parishes; provided, however, in the Parish of Orleans the same shall go to the General Fund.

Not to effect present laws.

Section 7. That the manner of collecting licenses under this Act and the enforcement thereof, the form of license receipt, and the manner of recording and filing affidavits shall be similar to that now provided, or may hereafter be provided, for the collection by the Tax Collector of other license taxes.

Penalty for violation.

Section 8. Any person, the member of any firm, the officer or manager of any corporation, violating any of the provisions of this Act, shall be guilty of a misdemeanor, and upon conviction in a court of competent jurisdiction, shall be punished by a fine of not more than Five Hundred Dollars nor less than Fifty Dollars, or by imprisonment of not more than ninety days nor less than sixty days in the parish jail, or both such fine and imprisonment, at the discretion of the court.

Exceptions.

Section 9. The provisions of this Act shall not apply to any person, firm, partnership, corporation, or association of persons, selling or distributing any commodity under a public utility franchise from the State of Louisiana or any parish, municipality or other political subdivision thereof, and selling only such goods, wares and merchandise, as may be used with the commodity distributed under such franchise.

Gasoline filling stations.

Section 10. That the provisions of this Act shall not apply to gasoline filling stations where the average daily stock of gasoline, motor oils or automobile accessories carried does not exceed Fifteen Hundred ($1,500.00) Dollars.

Constitutional provision.

Section 11. That in the event of any phrase, clause, or section of this Act is found to be unconstitutional for any reason, such unconstitutionality shall not have the effect of invalidating those other portions of this Act which may be found to be constitutional, but those other portions which are found to be constitutional shall continue to remain in force and effect.

Repealing clause.

Section 12. That all laws or parts of laws in conflict herewith be and the same are hereby repealed.

Approved by the Governor: July 7, 1932.

A true copy:

E. A. CONWAY,
Secretary of State.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE GREAT ATLANTIC & PACIFIC TEA COMPANY versus ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS, ET AL.	No. 277 IN EQUITY (Filed July 24, 1936)

Before FOSTER AND HUTCHESON, Circuit Judges, and BORAH, District Judge:

BORAH, District Judge:

This controversy involves the validity of the chain store license statute of Louisiana. Complainant, an Arizona corporation which with its affiliates operates 106 stores in Louisiana and a total of 15,082 elsewhere in the United States and in Canada, initiated this proceeding by the filing of a class bill in which twelve other foreign corporations operating retail units in Louisiana intervened and became coplaintiffs, praying that the tax officials be enjoined from enforcing the Act. The complainants challenge the statute as violative of the due process and equal protection clauses of the Fourteenth Amendment, of the corresponding provisions of the Constitution of Louisiana, and of the commerce clause of the Federal Constitution. Upon the filing of the bill a temporary restraining order was issued after notice, restraining the enforcement of the statute against the complainants. The defendants agreed without prejudice to the ultimate rights of any party to the suit that it was proper for the matter involved

to be held in statu quo until a hearing could be held on the merits, and accordingly an order for an interlocutory injunction was issued by a specially constituted District Court upon the case made out by the affidavits of complainant and intervenors to the original and intervening bills. The case was in due course set down for hearing and the matter is now before the Court for disposition on the merits.

The statute here under review, Act 51 of the Louisiana Legislature of 1934, was enacted pursuant to the provisions of Section 8, Article 10 of the Constitution of Louisiana for the year 1921, authorizing the legislature of Louisiana to levy license taxes, and providing that such license tax may be classified. graduated or progressive.

Section 1 of the Act provides:

> "Be it enacted by the Legislature of Louisiana, That because of the advantages accruing from the operation of multiple stores wherever situated, and because of the basic difference inherent in such character of operations; there be and is hereby levied an annual license tax for the year 1935 and for each subsequent year upon each person, firm, partnership, corporation or association of persons engaged in the business of operating, or maintaining, as part of a group or chain, any store or stores in this State, where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores."

Section 3 of the Act provides:

> "That the license tax for said business described in this Act levied upon the store or stores

operated in the State of Louisiana shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or control, whether operated in this State or not, and shall be fixed and graded as follows, to-wit:

(1) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of not more than ten stores, the annual license shall be Ten ($10.00) Dollars for each such store operated in this State.

(2) Upon stores * * * having a total of more than ten stores, but not more than thirty-five stores, the annual license shall be Fifteen ($15.00) Dollars for each such store * * *.

(3) Upon stores * * * having a total of more than thirty-five stores, but not more than fifty stores, the annual license shall be Twenty ($20.00) Dollars for each such store * * *.

(4) Upon stores * * * having a total of more than fifty stores, but not more than seventy-five stores, the annual license shall be Twenty-five ($25.00) Dollars for each such store * * *.

(5) Upon stores * * * having a total of more than seventy-five stores, but not more than one hundred stores, the annual license shall be Thirty ($30.00) Dollars for each such store * * *.

(6) Upon stores * * * having a total of more than one hundred stores, but not more than one hundred twenty-five stores, the annual license shall be Fifty ($50.00) Dollars for each such store * * *.

(7) Upon stores * * * having a total of more than one hundred twenty-five stores, but not more than one hundred fifty stores, the annual license shall be One Hundred ($100.00) Dollars for each such store * * *.

(8) Upon stores * * * having a total of more than one hundred fifty stores, but not more than one hundred seventy-five stores, the annual license shall be One Hundred Fifty ($150.00) Dollars for each such store * * *.

(9) Upon stores * * * having a total of more than one hundred seventy-five stores, but not more than two hundred stores, the annual license shall be Two Hundred ($200.00) Dollars for each such store * * *.

(10) Upon stores * * * having a total of more than two hundred stores, but not more than two hundred twenty-five stores, the annual license shall be Two Hundred Fifty ($250.00) Dollars for each such store * * *.

(11) Upon stores * * * having a total of more than two hundred twenty-five stores, but not more than two hundred fifty stores, the annual license shall be Three Hundred ($300.00) Dollars for each such store * * *.

(12) Upon stores * * * having a total of more than two hundred fifty stores, but not more than two hundred seventy-five stores, the annual license shall be Three Hundred Fifty ($350.00) Dollars for each such store * * *.

(13) Upon stores * * * having a total of more than two hundred seventy-five stores, but not more than three hundred stores, the annual license shall be Four Hundred ($400.00) Dollars for each such store * * *.

(14) Upon stores * * * having a total of more than three hundred stores, but not more than four hundred stores, the annual license shall be Four hundred Fifty ($450.00) Dollars for each such store * * *.

(15) Upon stores * * * having a total of more than four hundred stores, but not more than

five hundred stores, the annual license shall be Five Hundred ($500.00) Dollars for each such store * * *.

(16) Upon stores * * * having a total of more than five hundred stores, the annual license shall be Five Hundred Fifty ($550.00) Dollars for each such store * * *.

The bill alleges, and it is admitted, that the complainant is engaged in the business of selling groceries, fruits, vegetables, poultry, meats, cheese, eggs and other foods, meats and dairy products or goods commonly sold in grocery and meat stores, and has been so engaged for more than ten years. It operates under the same general management, supervision, ownership or control 15,082 stores, of which 14,800 are located in the United States and 282 are located in Canada. Of this number, 62 stores are located in the City of New Orleans and 44 stores are located at points in Louisiana outside the city of New Orleans, and it has capital invested in the State of Louisiana approximating half a million dollars.

The bill alleges that prior to the enactment of the 1934 statute, the tax imposed by the State of Louisiana upon chain stores was that established by Act 19 of the Louisiana Legislature of 1932. The Act of 1932, like the chain store tax statute of every other state in which such tax exists, provided for a classification based only upon the number of stores operated in the State and established ten classes comprising units of five each, and an eleventh class comprising all stores in excess of fifty. The tax upon stores in the last class under said Act was $200.00 per store; stores falling within the lower classes

paying at lower rates according to number of stores in each class, the said rates ranging from $15.00 to $100.00 per store for stores less than fifty in number.

The bill charges that the purpose and effect of the 1934 statute was to reach operators of chains outside Louisiana so as to produce revenue for Louisiana by an extra-territorial tax and at the same time to discriminate in favor of local chains by reducing the rates applicable to a local chain and increasing the rates applicable to a foreign chain even though the local chain may operate far more extensively in the State than does the foreign chain. Thus H. G. Hill Stores, Incorporated, which is in direct competition with the complainant, The Great Atlantic & Pacific Tea Company, and operates in New Orleans more stores than does the complainant, is required under the Louisiana statute to pay for its eighty-seven stores $30.00 per store, whereas the complainant has only sixty-three stores in New Orleans but each of said stores is required to pay a tax of $550.00.

In addition to the facts averred in the bill the complainants offered evidence to prove the following points:

Operations of chains doing business in more than one state vary greatly from section to section and from state to state because of differences in local conditions, economic and otherwise, freight rates added to cost, remoteness from headquarters and executive management, increase in difficulty of supervision, local competition and other factors.

Conditions as to sales and profits vary greatly in all classes of stores according to the section of the country

in which they are located. In almost every case operations in Louisiana are less than average for all stores operated by the particular company.

In every important respect the operations of the complainant are the same as those of H. G. Hill Stores, Incorporated. The gross volume of the sales of the Hill Stores in New Orleans is very much greater; they have more stores and do more business per store than the stores of the Great Atlantic & Pacific Tea Company, and under the statute they pay $30.00 per store, while complainant is required to pay a maximum of $550.00 per store on every store.

Other corresponding differentials are set forth to show that one of the purposes and effects of the Louisiana statute is to discriminate in favor of a Company which operates in Louisiana a larger number of units than a competitor which operates a smaller number of units in Louisiana, but a larger total number in the world.

With reference to the situation in Louisiana as of date February 10, 1936, the proof shows that complainant operated 109 stores of which 66 were in New Orleans; other food chains operated 197 stores; independent grocers operating under one general supervision and pooling their purchases operated 128 stores; and entirely independent grocers operated 2820 stores. The census reports further show that the number of chain stores in Louisiana is decreasing at a more rapid rate than the number of independent stores, and that the number of wholesale stores in Louisiana is actually increasing.

The defendants produced evidence to prove that the retail units operated in Louisiana by complainant and intervenors are part of a chain or system; that all the units of a retail chain contribute to the central purchasing power of the chain irrespective of state lines and location of stores and increases the per unit multiple advantages enjoyed by the operator of the system; that the greater the number of units in the chain, the greater the purchasing power, the greater the secret rebates and allowances, the greater the advantages in advertising, the greater the capital employed, the greater the social and economic consequences, and the lower the cost of distribution and overhead.

Testimony was also offered similar to that found in the original chain store tax case, State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527; 51 S. Ct. 540, 75 L. Ed. 1248, 73 A. L. R. 1464, establishing the difference in the type of operation between the operator of one store and the operator of many stores, and the difference in the type of operation, varying with the number of units, with additional reference to the difference in the method of operation of the Great Atlantic & Pacific Tea Company as compared with the H. G. Hill Stores.

In fine the record in this case shows the contribution to the advantages made by each unit in the chain, and the per unit advantage made possible by the whole system, and in that respect only does it differ materially from the proof which was before the court in the Jackson case. Indeed the only question presented here over and above that which received the consideration of the Court in State Board of Tax Commissioners v. Jackson, supra; Louis K.

Liggett Company v. Lee, 288 U. S. 517, 53 S. Ct. 481; 77 L. Ed. 929, 85 A. L. R. 699 and Fox v. Standard Oil Company of New Jersey, 294 U. S. 87, 55 S. Ct. 333, 79 L. Ed. 780, is the method used by the Legislature of Louisiana in arriving at the rate of the tax per unit in Louisiana.

It is well settled under the authorities, supra, that there are differences and advantages in favor of large chains and for that reason the State may tax the large chains more heavily than the smaller ones, and upon a graduated basis. In the present case the State imposes a license or privilege tax, clearly within its authority, for the privilege of doing business in Louisiana. The measure of that tax is the number of units in the chain in the State. The rate is determined by the number of stores in the entire chain. No property beyond the jurisdiction of the State is in any just sense taxed under the statute. The rate only is affected by units of the chain outside of Louisiana and these units are considered only for the purpose of determining the type of business done in Louisiana and the value of the privilege of operating each unit in the State. Where as here the power to tax exists, the extent of the burden is a matter for the discretion of the legislature. The wisdom of its exercise is not the concern of this Court.

Complainants further contend that the Louisiana Statute does not represent any policy to protect, and was not designed to, and does not in fact protect independent merchants against chains, but establishes an arbitrary discrimination against chains operating in other States. "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded

upon a reasonable distinction, American Sugar Rfg. Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman & Lewis Co., 240 U. S. 342; 36 S. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350" State Board of Tax Commission of Indiana v. Jackson, supra. The statute here assailed classifies chain stores in accordance with the economic advantages which they possess and gives recognition to the basic differences of their operations. It imposes a license tax for the privilege of operating retail units in multiple form reasonably adjusted in amount with regard to substantial differences in the value of the privilege exercised. The classification is neither arbitrary nor capricious. The statute treats upon a similar basis all owners of chain stores similarly situated. In the light of what we have said this is all that is required by the equal protection clauses of the Federal and State Constitutions.

What has been said in respect of the contention that the tax establishes an arbitrary discrimination against chains operating in other states is a sufficient answer to the contention that property has been taken without due process of law.

It is asserted on behalf of the intervenors, Montgomery Ward & Company, Incorporated, and Sears-Roebuck & Company that the tax is invalid (1) because it is levied for the privilege of operating stores conducting both intrastate and interstate business and the tax is not divisible in accordance with the respective amounts of intra-

state and interstate business transacted, (2) because it is levied for the privilege of carrying on Louisiana business and is partly measured by interstate operations carried on wholly outside the State of Louisiana. The claim does not merit serious consideration. The statute by its express terms applies only "where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail".

The order heretofore entered granting an interlocutory injunction is recalled, and the decree for injunction denied, and the bill of complaint dismissed. Appropriate orders may accordingly be entered.